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IN THE

Supreme Court of the United States

No. 238.

THE TEXAS AND PACIFIC RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

GEORGE H. DASHIEL, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

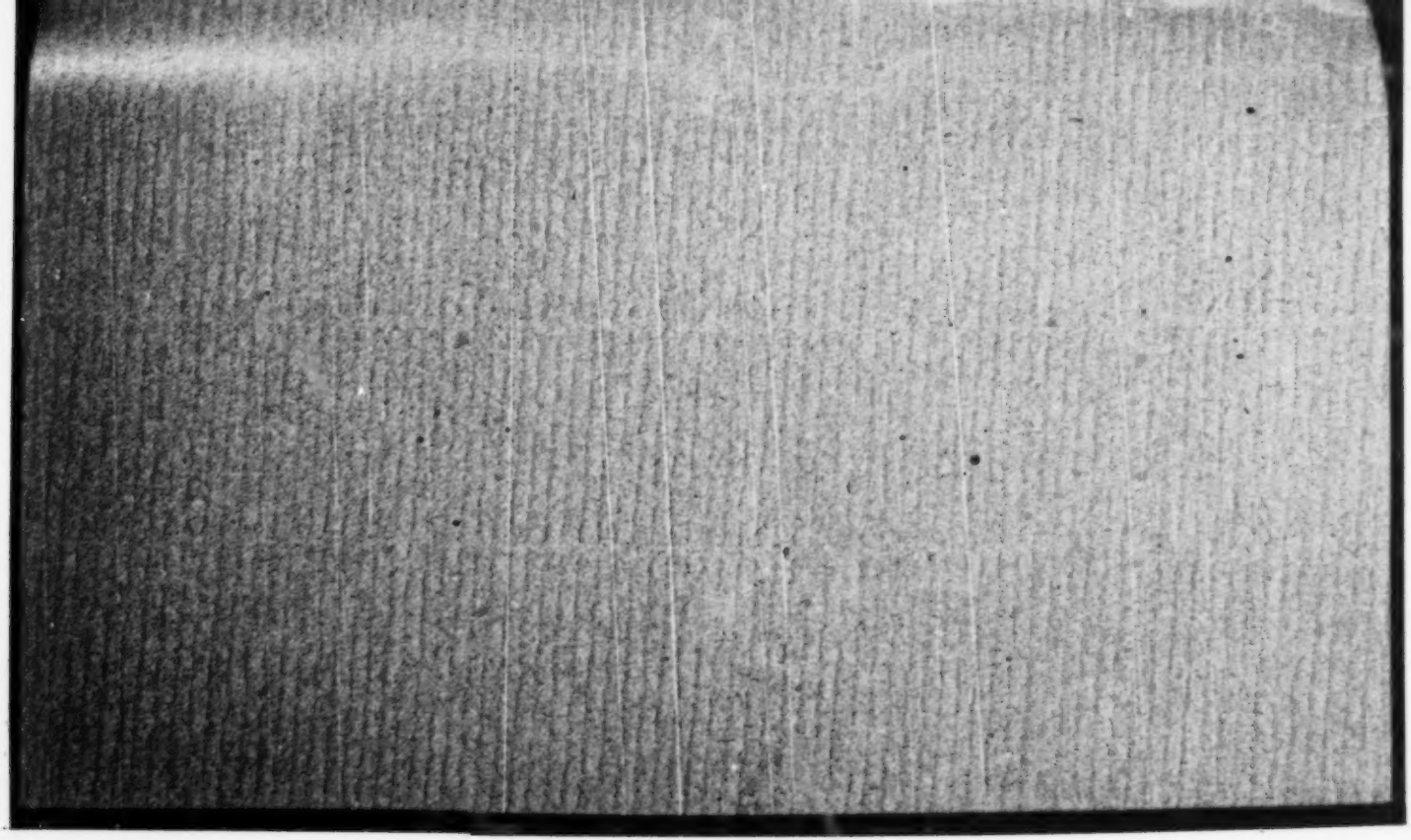
BY

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

BY Ben M. Davis

ATTORNEY FOR DEFENDANT IN ERROR, GEORGE H. DASHIEL.

May it Please the Court:

Not having been favored with the brief of plaintiff in error, we ask your indulgence in presenting this as a reply to the specifications of error found in the record.

On November the 12th, 1903, this cause, on error to the Circuit Court of the United States for the Northern District of Texas, was submitted to the United States Circuit Court of Appeals, sitting at Fort Worth, Texas. (Rec., p. 104.)

Thereafterwards, on the 2nd day of February, 1904, said Court unanimously affirmed the judgment of the trial Court. (Rec., pp. 105 to 109.)

Thereafterwards plaintiff in error brought said cause to this Court by writ of error. (Rec., pp. 110-117.)

That we may properly discuss the specifications of error here presented, we state as briefly as possible the nature and result of this suit and of the defenses urged in said trial Court:

Plaintiff, by next friend, in his first amended petition, alleged that on 24th day of December, 1900, he was serving defendant as a freight train conductor and that while running such train in an easterly direction between Eastland and Ranger, he was, through the negligence of defendant and its employees, operating another train in the same direction, violently collided with by said rear train.

The careless acts and omissions of defendant charged were (1) negligence in running the rear train backward with engine on the wrong end and pointing in the wrong direction; (2) negligence in the high and dangerous speed of said rear train, under the circumstances and the manner of its operation; (3) negligence in not maintaining on the rear train at the time and place of and before the collision a sufficient watch and look-out; (4) negligence in that the regular rear brakeman of the colliding train had abandoned his post of duty and in his stead was serving a green hand unfamiliar with the road and physically incompetent for the position of head end brakeman; (5) negligence in that defendant knew, or could have known, of said incompetency, yet carelessly employed and retained said servant; (6) negligence in that said rear crew at the time of the collision were violating a rule of the company that one freight train should not follow another *closer* than five minutes in space of time. Serious, painful and permanent injuries were alleged to plaintiff's head, eyes, brain, mind, and nervous system; that he was rendered unsound of mind and incapacitated for the transaction of business matters or for performing mental or manual

labor. His damages were laid at $50,000. (Rec., pp. 2 to 5.)

Defendant answered by (1) general demurrer; (2) general denial; (3*a*) special answer alleging certain acts and omissions of Dashiel as constituting contributory negligence; (*b*) contributory neligence in his alleged failure to take proper medical treatment and in the alleged aggravation of his injuries by the use of intoxicants; (4) that if rear train employees negligently caused the collision they were Dashiel's fellow servants and he assumed the risk of their carelessness: (let us suggest here that this was the only matter of assumed risk plead;) (5) that subsequent to his injury Dashiel for $30,00 executed a release to defendant; (6) that thereafterwards he worked awhile for the company and thereby ratified the terms of the release and said instrument was pleaded in bar to all injuries set out by plaintiff. (Rec., pp. 5-7).

Plaintiff replied by a supplement (1) general demurrer; (2) special demurrer to third clause of answer because indefinite, vague, uncertain as to the negligent acts and omissions of plaintiff and because simply stating the pleader's conclusion; (3) special demurrer to the fourth clause of answer because it did not negative that plaintiff and said negligent employees were not in a common employment, were not working together at the same time and place, to a common purpose and *at the same piece of work;* (4) a special demurrer to clauses 5 and 6 of said answer because the release therein plead showed on its face, in the first clause or half thereof, that Dashiel did not undertake to acquit defendant of any injury and damage except "Bruising my body, right leg, right arm and giving me a scalp wound," these being the "*certain personal injuries sustained and of the character described,*" and further because the very general words in the last clause of said release were limited to and qualified by the very specific state-

ment of injury set out in the first part thereof and in said first part mentioned as *certain* personal injuries of the *character described;* (5) a general denial was also plead and by several pleas plaintiff alleged mental incapacity to make or ratify the pretended release, want, failure and inadequacy of consideration, mutual mistake as to the nature, extent and seriousness of his injuries at time of the alleged execution and ratification of release and that when said contract was executed the *serious* injuries herein sued for had not developed and were not thought of or contemplated by the parties when they made the release: and he further specifically plead that the general words of release in the last clause of said instrument were limited to and qualified by the specific matters of injury stated in the first thereof and incorporated into the instrument at the time it was signed. In all of said pleas relative to said release plaintiff prayed for *equitable* as well as legal relief. (Rec., p. 7-13).

Defendant by supplemental answer plead: (1) General demurrer; (2) two special exceptions; (3) general denial. (Rec., p. 13).

Upon all questions of pleading or demurrer relative to said release or other matters the trial Court withheld its judgment, (counsel for each party acquiescing in such course), until introduction of all the testimony and controlled all such matters of demurrer or pleading in the admission of the evidence and in his charges to the jury given or refused.

The verdict awarded plaintiff $7500. (Rec., p, 15). After motion for new trial was overruled, the cause was by defendant upon certain specifications of error transferred to the said Fifth Circuit Court of Appeals and there affirmed as aforesaid. (Rec., pp. 16 and 17 and Rec., pp. 95 to 109).

In brief and argument before said Court of Appeals

plaintiff in error abandoned its first, second and third assignments which are to wit: the second, third and fourth errors specified in this Court. (See brief, p. 6, on file in said Court of Appeals.) We shall not, therefore, further notice errors 2, 3 and 4 here specified. (Rec., p. 110).

It was not error for said Court of Appeals to affirm the action of the trial Court relative to the matters complained of in 10th specification of error. (Rec., p. 112).

A charge that: "If a preponderance of the evidence does not establish the fact that the plaintiffs injuries are of a permanent nature, then you will disallow any claim therefor," is misleading, confusing, and involved. Why should a jury disallow *anything* for plaintiff's injuries simply because they might believe them temporary and not permanent? If the charge meant to inform the jury that they should give nothing for the permanent injury or the permanent effects thereof, if they found the injury not permanent, then the action of the jury should have been so limited by the charge and it should not have given them a "roving commission" to cut plaintiff *wholly* off from damages both temporary and permanent simply because they might conclude in the negative relative to such permanency.

The general charge gave sufficient directions concerning permanent injury, disability therefrom and the matter of compensation therefor, and such general charge was sufficient to guarantee all the rights of both parties. (Rec., p. 94.)

Suppose this charge had been requested and given, to-wit: "If a preponderance of the evidence has established the fact that plaintiff's injuries are not of a permanent character and that the effect of said injuries is temporary, then if you find for plaintiff on the question of damages you will not allow him anything for permanent character of the injury."

Under the evidence in this record the Court certainly would not have been justified in giving a charge more favorable to plaintiff in error. And if any charge, at all, was called for on the subject complained of, the one just indicated by us would have placed, at least, a little guard about the rights of defendant in orror while the matter of his compensaiion was being considered.

The general charge of the Court fixed the burden of proof on plaintiff to make out his whole case by a preponderance of the evidence, and if defendant was not satisfied with said charge and desired an affirmative presentation of the negative side of the question, it ought to have requested a proper special charge and since the charge it asked was obnoxious and misleading no error can be predicated on its refusal.

OBSERVATIONS.

Analyzed in the light of the pleadings and evidence the refused special charge denies recovery unless the injuries are of permanent nature, whereas plaintiff was clearly entitled to recover damages for pain and suffering, and temporary damage and injury up to the time of the trial. Clearly the words "any claim therefor" referred to "injuries." Plaintiff in error in the Circuit Court of Appeals cited the case of Texas Trunk Ry. vs. Ayres, 83 Texas, 268. (Its brief in said Court, p. 42.) In the Ayres case the charge refused read: "Unless it is shown affirmatively by a fair preponderance of the evidence that plaintiff's injuries are of a permanent character, you will disallow his claim for injuries of *that character.*" (83 Texas, 269.) Hence, it seems to us that the charge was misleading, confusing and obnoxious, and was properly refused.

We submit that the record of evidence warranted a peremptory charge that plaintiff's injuries were parmanent, and that no special charge in the negative was authorized by the testimony.

We briefly quote the testimony on that issue.

Dr. Harper,(Rec. p. 37), "They," (his mother and family), "asked me about an operation. I told them I couldn't promise them *any thing*; if there was an internal depression, of course an operation might do good if done soon; however *after this long a time it is rather too much to promise.* There had been a fracture of the external table I know from the depression. There has been a fracture there, you can see it below the general surface, *in the cranium. A scalp wound* wouldn't cause that kind of a depression." On page 36 he says: "From my *examination* and the history of the case, I should say that he has *mental aberation* or what is called mild dementia. In my opinion that would render him *incapacitated* for the transaction of business matters. I base my opinion on the history of the case and the *objective symptoms*; this condition may be produced by pressure on the brain; an injury to the brain will produce headache. I also took into consideration his physical apperance; he has a heavy expression, I would call it a dull, heavy expression of the face. Extreme nervousness and inability to sleep are symptoms of mental disturbance." (Rec. p. 36.)

Dr. Frost, (Rec, pp. 29-30), testified:

"Was called to attend to Dashiel December 24, 1900. * * * He was lying on bench in depot; he was suffering from injuries to head and in a shocked condition; he had a wound on top of his head, or near the top, and the left side of his head was *bruised;* the bruise on side of his head I regarded as the worst injury; *he complained of his head and his left eye;* wound on top of his head seemed to have been made by being impinged between two hard substances; seemed like this side of his head, left side, *was bulged;* seemed like it had been pinched; there was a *depression* there; my idea was at the time that it might be twenty years before the injury developed sufficient to pro-

duce pressure on the brain—anytime between then and twenty years—in other words, *it might be progressive.* * * * Knowing the case as I do, *I do not consider him of sound mind.* The wound could have produced and probably did produce an osceous tumor or lymph formation to form some where in his head that would cause pressure to exist in the brain and produce *pain in the head.*"

Again, on cross examination:

"In fact he was in such hilarious state that he would hardly submit to an examination of his body, said he was all right, *just take care of his head*, that was all he cared for. I examined his head and found no other depression that I thought would cause trouble. The injury I found was on the side of his head; the whole side of his head *was bruised and the blood oozing;* looked like it had been caught and squeezed; there is no scar there now; I washed blood off, of course I thought it was from scalp wound until I got to dressing it and found the blood oozing from here—side of head (indicating); it was bruised and discolored." (Rec. p. 30).

Dr. Sat[illegible]ers, witness for defendant, (Rec., p. 71), testified, when examined by the Court:

"The symptoms accompanying an osceous tumor, or lypmph formation in the head or brain, are *very violent headaches and intense pains in the head.*"

Dr. Borders, (Rec., p. 32), testified:

"Was called to see Dashiel 24th June, 1901. There was a depression on left side of his head; he had received an injury and suffered from symptoms of compression of the brain. He was very nervous at the time; complained of considerable pain in the head, nervousness and inability to sleep. Gave him medicine to act on the brain; under my treatment he got a little more quiet and rested better. From my observation, examination and treatment of him would say that his mental faculties seemed somewhat im-

paired; had never examined him before injury and couldn't tell whether any change in facial expression, except his eyes were rather peculiar; one pupil was slightly dilated, the other contracted. There is a relationship between the *mental and moral faculties;* we often see that a derangement of mental faculties *interferes with the moral faculties.*"

Dr. Talbott, (Rec., pp. 34-35), testified:

"I examined him in regard to his mental condition. From my examination, I don't think he is in his own mind. I think he is suffering from a *condition of insanity;* I base that opinion on the *objective symptoms*, his general appearance and the history of the case. In my opinion he is not mentally responsible for his acts. I don't think he is in a condition to perform physical or mental labor."

Whitsitt, the druggist, (Rec. pp. 45-47), testified.

"Knew Dashiel before injured. After he was injured, and before he went to work, he would come into my store. He seemed to be *different* from what he used to be. He seemed to be abstracted and acted funny, as if he had been drinking. * * * I missed him for about a month. He came into the store one morning and seemed to be further off in his actions from his natural condition than he formerly was. He would conduct himself strangely in the store. His actions were *quite different* from what they were several months before; so much so that, while I never made any remark about his condition prior to this, his peculiar action that day brought all these things to memory. And then I asked about him."

CROSS-EXAMINED:

Missed him for about month and he came back again and acted stranger than ever, and I made up my mind not to sell him anything at all. He did not want to buy morphine or drugs of any kind, or whisky. It was

not on account of being afraid of not getting my pay, that I shut him off, but because his *actions were so peculiar.* Noticed him about three times before he went to work and once after he came back. His actions were such when he came back that it caused me to make inquiries about him. I never saw him *at any time* that I thought he was drinking."

Dr. Mullins, occulist and aurist, (Rec., pp. 28-29), testified:

"Am graduate of Bellvue Hospital, New York. Examined plaintiff's eyes three times. I put him through the different tests, by putting a card with letters of different sizes at different distances, and by also using the prismatic test. With left eye he could only see top or large letters, at a given distance, and possibly the others poorly. Put him through all the tests *known* to the profession and * * * I was satisfied he * * * could not see out of that eye. His vision in his left eye is depreciated from five-sixths to nine-tenths."

CROSS-EXAMINED.

"An injury to the nerve seat might affect the function of the brain, and also *affect the functions of the sight.* In testing his left eye as to whether defective or not, I placed a twenty degree prism, the base out, over the left eye and directed him to look at a test at twenty feet distance. The prism thus placed *throws cross angles* of vision, and there will apparently be two test cards. The one of the left is seen by the right eye and the one on the right by the left eye. I saw how Dashiel read with this test and compared same with previous tests and satisfied myself that his left vision was depreciated, as above stated."

Mrs. Dashiel, mother of plaintiff (Rec., pp. 43-44), testified: "When he went to work I was opposed to it, I thought he was not right mentally; I begged him not to

go to work; his wife insisted that he must go to work. I knew from way he talked and acted he was not all right. He didn't seem to have any control over his mind. He didn't seem to understand anything, like he was in a dazed condition biggest part of the time. Complained of head most. *Continual* pain and dizziness. Noticed difference in his appearance—dull expression in his eye. In my opinion *his mind is affected* and has been ever since the injury. He is very nervous and cannot sleep nights. I frequently see him sitting up in the bed and *holding his head.* Would speak to him and he would say his head hurt him so he *couldn't sleep.* Never heard any complaint of his eyes before he was injured."

Dr. Pring (Rec., p. 25), treated Dashiel in New Mexico in June, 1902. In his medical experience had treated and examined a number of cases of insanity and diseased or deranged minds. "I found his mind deranged, verging to insanity, because of a fracture of the skull received at some previous time." Formed his opinion after examination as to his mental organism and found his mind deranged to a considerable extent. His acts and general conversation showed his mind unbalanced. On 20th June, 1902, he was taken away and was suffering mentally and unable to take care of himself. (Rec., p. 25.)

There is a great deal of other testimony sustaining our contention that the permanency and seriousness of plaintiff.s injury is practically *undisputed.* We think it conclusively shown that the injuries were of such a character, as said by Dr. Harper, that an operation at this late day *could promise nothing* and that a peremptory instruction for plaintiff as to their permanency would have been warranted.

There was apparently no conflict upon the question of plaintiff's mental unsoundness since injury and at time of

trial and the evidence is certainly *undisputed* that since the collision he has lost an eye.

In this connection we submit:

That where the evidence shows insanity and mental derangement existent at time of and before the trial there is raised a legal presumption that such will continue, and the party contending that such condition will not be lasting has the burden to establish such fact by a preponderace of the evidence To wipe out a presumption of law or fact, the burden is not on the party who has already raised that presumption in his favor.

Bradner on Ev., p. 211, Sec. 1, says;

"As the proceeding goes on the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor." Citing:

R. R. Co. vs. Gladmon, 15 Wall., 401,406.

Second: Replying to the XV specification of error, (Rec. pp. 113-114), we urge: That neither the pleading nor evidence of the defendant in error showed him *prima facie* guilty of contributory negligence, nor did they raise even a suspicion thereof. Therefore it was proper to charge the burden of proof on said issue on plaintiff in error.

The law places the burden of proving contributory negligence on the party pleading it if there is nothing in the record making the particular case an exception.

Where the Court charges the burden on defendant to show by a preponderance of "the evidence" that

plaintiff was guilty of contributory negligence, the words "the evidence" embrace all the evidence of both parties, and submits that issue to the jury, not upon evidence offered by one side nor the other, but upon all the evidence. The jury must have understood that the burden was on defendant to show by all the evidence introduced by either party tending to prove contributory negligence and that they were not confined on that issue to any particular part of the evidence.

We think there is no substantial conflict between the Texas and Federal decisions on this question, but if there should be then in the absence of a positive statute (and Texas has no such statatute) the United States courts will decide the question as depending upon general principles, and are not required to follow the decisions of state courts.

AUTHORITIES.

Hough vs. R. R. Co., 100 U. S. Rep., pp. 213-226.

R. R. Co. vs. Horst, 95 U. S. R., p. 291.

R. R. Co. vs. Gladmon, 15 Wall., p. 401; (s. c.) 82 U. S. Rep., XXI, p. 114.

Tex. & Pac. Ry. vs. Reagan, 118 Fed. Rep., pp. 815-818.

Wharton Neg., Sec. 428, and authorities cited in note 1.

Especially see:

R. R. Co. vs. Howard, 75 S. W. R., p. 807 (late decision by Texas Supreme Court).

R. R. Co. vs. Sheider, 30 S. W. R., p. 902.

R. R. Co. vs. Long, 74 S. W. R., p. 60.

R. R. Co. vs. Buie, 73 S. W. R., p. 854.

R. R. Co. vs. Gist, 78 S. W. R., p. 859.

R. R. Co. vs. Jackson, 71 S. W. R., p. 992.

In Hough vs. R. R. Co., above cited, there was knowledge by the servant of defective, insufficient machinery and his continued use thereof, after notice to master and promise to repair. He was held not guilty, as a matter of law, of contributory negligence, and that the burden of showing him so guilty was on the company.

Elsewhere in this brief we submit our views in argument upon the question of plaintiff's freedom from even a *suspicion* of contributory negligence, and the above cited Federal and State authorities fully sustain the complained of charge, and we will not further discuss this question.

Third: Assignment of error No. VIII (Rec., pp. 111-112) complains of the refusal of a certain special charge, which in so far as the evidence warranted was fully presented in the Court's general charge on the issue of negligence and contributory negligence.

Assignment No. XVI (Rec., p. 114) is composed of assignments No. 15 and 16 (original Rec., p. 113), and is practically an insistence that there should have been directed for defendant a verdict on all points involved.

Assignment No. IX (Rec., p. 112) complains of the refusal of a charge on "assumed risk."

Assignment No. I complains of judgment of said Circuit Court of Appeals.

They all pertain substantially to the same general subject and will be treated together.

Replying to assignment No. IX., the matter of assumed risk therein suggested was wholly inapplicable to plaintiff's situation, and we urge (1) that there is not a syllable of evidence tending to show that plaintiff knew the rear train was running backward. (2) That even if the testimony tended to show that

he had such knowledge, the same could have been acquired only after the rear train came out of the curve, and was within a mile, and within less than five minutes of the front train. (3) That such being the situation, there was no reasonable opportunity for him to quit his train. (4) That to have stopped and abandoned his train under such circumstances would have been almost certain death or injury to his own and rear train crew, and might have jeopardized defendant's passengers on train No. 5, (passenger) which plaintiff was soon to meet. A special charge should always be viewed in the light of the facts and circumstances, and should never be given if too abstract, unjust and unreasonable when so viewed.

The requested charge required plaintiff to assume not only the ordinary, but the extra hazzards of the rear train operation. It cut the jury off from giving plaintiff right to assume that rear employes would operate their vehicle with proper lookout, at proper rate of speed, and not too close to him as was prohibited by said 5 minute rule. At least, such would have been the effect of said charge. In the light of the facts, the charge, if given, had been gross error, because defendant was thereby relieved from liability if plaintiff knew said matter of running backwards, whether or not defendant and said rear employees were further guilty of negligence while so operating, and independent of the more backward movement.

The effect of said charge had been to single out a

supposed isolated feature of the evidence, and thereby scarf up the eyes of the jury to other matters of negligence charged and proved against the rear employees, and intimately associated with their running backwards.

If Dashiel can be held to have assumed the risk of the train running backwards, when so operated with proper attendant care, yet when such manner of operation is accompanied by negligent lookout, excessive speed and the *admitted violation* of said 5 minutes rule, then said manner of operation became an extra hazard to him, at his post of duty, on a different piece of work, and at a different time and place. The effect of said charge was to place on him all risk as to said manner of running; made him assume all negligence attending said manner, and took from him the right to assume that, while doing a work in a dangerous manner, defendant would not associate extra negligence with such dangerous performance.

The effect of such charge had been practically to have directed a verdict for defendant.

Unless Dashiel knew of the running backwards, and also knew of said attendant negligence and extra hazards in time to have quit the service, and had a reasonable opportunity to do so, without endangering his own and the life of others, and without exposing company property to destruction or damage, then we maintain that he should not be held to have assumed either the ordinary or the extra dangers of said operation. The charge, stand-

ing unmodified, wholly disregarded such matters and was correctly refused.

AUTHORITIES.

A charge similar to one at bar, requested by same counsel, held properly refused.

See R. R. Co. vs. Eberhardt, 91 Texas, 322-324,

In which it is said: "Servant knowing of negligent manner of doing a work assumes *only* the ordinary risks," etc.

Where a servant even has to work *with or on* the instrument of injury and first discovers the defect *at time* of the injury, assumed risk doctrine not applicable.

See R. R. Co. vs. Milam, 50 S. W. R., pp. 421-422.

The Milam case also holds assumed risk and contributory negligence identical, when interposed as a defense against the master's negligence.

When in duty bound to obey, a servant does not assume a risk springing from the negligence of master or vice-master.

R. R. Co. vs. Wrenn; (Texas), 50 S. W. R., 210-212.

Burke, the vice-master of plaintiff in error, was on colliding train and knew its dangerous manner of running, and knew Dashiel was ahead with Burke's orders as to letting off section man.

That he was the company's vice principal

See Sayle's Civil Stat. Texas, Art. 4560g.

As follows: "All persons engaged in the service of any * * * corporation controlling or operating a railroad * * * the line of which shall be situated in whole or in part in this state who are entrusted by such * * * corporation with the authority of superintendence, control or command of other servants or employees of such * * * corporation or with authority to direct any other em-

ployee in the performance of any duty of such employee, are vice-principals of such * * * corporation and are not fellow servants with their co-employees." (Acts of 1897).

An employee knew a hand car was defective and knew it was being operated behind one on which he was riding. He was injured in a collision. The Court held: "Nor could it be said, we think, as a matter of law, that there was an assumption of risk by the plaintiff. * * * But the question is, did he act with the care and foresight which a person of ordinary prudence would have exercised in changing his relation to the hand car and remaining in the service?"

See R. R. Co. vs. Williams (Tex.), 34 S. W. R., p. 162.

Refused charge herein made defendant in error, as a matter of law, assume all risk on the issue in question and had practically charged him out of court.

An injured employee and a negligent employee were on a different piece of work and there was injury by collision. Charge on assumed risk not called for. See:

R. R. Co. vs. Newburne (Tex.), 58 S. W. R., pp. 542-544.

A special charge giving undue prominence to any one of several matters charged as negligence should be refused.

Contributory negligence and assumed risk on the part of one occupying plaintiff's position were questions for the jury and were not purely matters of law.

See R. R. Co. vs. Shearer (Tex.), 21 S. W. R., 136-137.

R. R. Co. vs. Thompson (Tex.), 24 S. W. R., p. 139.

A servant may recover for injuries due to master's fault, as to defects of which he had notice, if under all the circumstances a servant of ordinary prudence would,

under similar conditions, have continued in the same work under the same risk. Servant has a right to assume that his employer will exercise such *additional* care as the exigencies of the case demand. See especially:

R. R. Co. vs. Vestal, (Ky.), 49 S. W. R., pp. 204-207.

Let it be noted that the only assumed risk plead was of "fellow service" negligence, to which we urged special exception, which was practically sustained by the Court in his charge to the jury. There was no pleading upon which to base the refused charge.

See clause 4 defendant's answer, Rec., p. 6 and paragraph 2 of plaintiff's Sup. pet. Rec., p. 8 on this question.

Sayles Civ. Stat. of Tex., Art. 4560, a Statute of June 10, 1897, Session Acts, First Called Session, Twenty-fifth Legislature, provides:

"All persons who are engaged in the common service of such * * * corporation, controlling or operating a railroad * * * and who while so employed, are in the same grade of employment and are doing the same character of work or service, *and are working together at the same time and place and at the same piece of work* and to a common purpose are fellow servants," and those who do not come within said provisions are not fellow servants. It is thus apparent that no assumption of fellow service negligence could obtain in this case.

See also, R. R. Co. vs. Bohan, 47 S. W. R., p. 1054.
Mayton vs. Sonnefield, 48 S. W. R., p. 610.

We understand the rule in the Federal Courts to be, that a servant may have knowledge of a defect or danger, yet such knowledge ought to be viewed in the light of the attendant facts and circumstances, and it should not be held as a matter of

law that such knowledge makes absolute assumption of risk. A jury ought to consider such knowledge in connection with all the facts and determine whether the party exercised a caution demanded by all the circumstances. They should not be required to stop short, as a matter of law, at such knowledge, if found existent.

AUTHORITIES.

T. & P. Ry. vs. Archibald, 170 U. S., top pp. 665-675, bot. p. 1188.

R. R. Co. vs. O'Brien, 161 U. S., bot. p. 452, top pp. 767-771.

R. R. Co. vs. Babcock, 154 U. S., bot. pp. 958-962.

Kane vs. R. R. Co., 128 U. S., top p. 94, bot. pp. 339-344.

Cunard S. S. Co. vs. Carey, 119 U. S., bot. pp. 357-358.

R. R. Co. vs. Ross, 112 U. S., top pp. 377-398, bot. pp. 778-794.

Hough vs. R. R. Co., 100 U. S., top p. 213, bot. p. 612.

R. R. Co. vs. Johnson, 16 U. S., "C. C. A.," p. 331.

Shearman and Red. Neg'l, (4th Ed.), p. 315, sec. 185.

If we concede (and we do not) that Court erred in refusing said charge, yet the action was harmless and could not have affected the result, because by the almost undisputed testimony the jury were authorized to find, attending the backward running, (1) negligence as to lookout; (2) as to excessive speed; and (3) as to the *admitted* violation of said five-minute rule.

See: R. R. vs. Ross, above cited, top p. 423.

Also, Brobst vs. Brock, 10 Wall., p. 528.

In Kane vs. R. R. Co.,above cited,Judge Harlan held:

"It cannot be said that plaintiff was guilty of contributory negligence in staying upon the train, after observing that a step was missing from one of the cars over which he might pass in discharging his duties. An employee upon a railroad train, *likely to meet other train*, owes it to the public as well as his employer, not to abandon his post unnecessarily."

In R. R. Co. vs. Johnson, above cited, Judge Morrow said:

"The doctrine of the assumption of risk by an employee imports, as an *inseparable prerequisite*, complete knowledge and understanding on the part of the employee of the risk and danger, and an intelligent and full consent, express or implied, to abide the consequences."

STATEMENT.

Bearing upon the question of assumed risk and also of negligence and contributory negligence, the evidence shows: Defendant's admission that Burke, its road master, had athority to order plaintiff to carry and let off a section foreman at Eastland section house. That at Delmar, (west of Cisco,) Dashiel was so ordered. That Burke rode the colliding train from Delmar to place of collision and was himself injured. (Rec., p. 74).

It was admitted by defendant that said 5-minutes rule was proven in force at time and place of collision. (Rec., p. 74).

Also that company rule No. 2, (introduced by plaintiff as applicable to the conduct of the rear train engineer), made said engineer equally responsible with his conductor when conductors directions conflicted with rules or involved risk. (Rec., p. 74).

That it was ten miles from Cisco to Eastland. (Rec. p. 18).

That after passing Eastland a short distance there was a curve in the track and after passing curve going east track was straight for about one mile from end of curve to point of accident. (Rec., p. 18).

Engineer Haire was sidetracked at Eastland to meet Dashiel's train, but had no orders for rear train. After Dashiel's train passed, short train flipped by. Both running about eighteen miles per hour and not more than *two or three* minutes apart. Have gotten slow signals from rear end of trains, but not often, for I make it a rule not to get too close. Not the custom for work trains to run in night past stations where there is a "Y" and sidetracks with the engine to the rear of the train. When there is opportunity to turn train or engine around they usually do so. We *always* turn engine and run ahead when there is a *chance*. By pushing a train after night you are liable to run over some object *in front* of you. (Rec., pp. 22-23).

Petry said both cabooses were "torn to pieces" by the collision. That the rear train was backing fifteen or twenty miles an hour at time of collision. That he was the regular brakeman on the rear train, but that he had gone into caboose to *get warm* and Childress had taken his place and that Childress wore eye-glasses. I last saw Dashiel's train about mile before the accident. *It was moving along in easterly direction.* There were sidetracks and switches at Delmar, Cisco and Eastland.

Madison, front train engineer, witness for defendant, testified:

"That at point of collision was considerably up grade. *First time* I saw rear train was at Eastland, as we were coming through. Can't tell just how far it was behind us when we passed Eastland. *Our train never did come to a*

standstill. Would not consider it *necessary* to send a flagman back if you are running *eight miles an hour.*" (Rec., pp. 47-50.)

Kincaid, front train fireman, witness for defendant, testified:

"Don't think our train was running over ten or twelve miles an hour (at time of collision.) Was up grade at point of collision. An engineer *could not protect* forward end of a train backing up as well as he could if engine was in front. There was a "Y" at Cisco where the engine could have been turned around." (Rec., pp. 50-53.)

Berry, front train brakeman, witness for defendant, testified:

"Before we let the section man off we were running fifteen or twenty miles an hour. We slowed down when we let him off to *ten or twelve* miles an hour. Both trains were on straight track and running up hill. The angle cock applied on a train running up grade, fifteen or twenty miles an hour, air applied wide open would stop train very soon, in eight, ten or twelve car lengths. When we let section man off our train, I did not apply air fully, just touched the air *lightly.* Would not take long to apply the air and then for engineer to release it." (Rec., 55-56.)

Swick, engineer on colliding train, witness for defendant, testified:

"We were running on orders from superintendent. We left Cisco from *five to ten minutes behind front train.* We turn an engine on a turntable or "Y." There was a "Y" at Cisco. We lay at Cisco *four or five* hours. The last time I saw front train it was about a mile ahead of us, and we were running seven or ten miles an hour. Before that we were running about twenty miles an hour. If air had been turned on full on our train it would not be *long* in stopping. There was a siding at Cisco and Eastland where we *could have put our engine in front.* I saw no

signal within mile of collision from brakeman Childress. I *knew* there was a train in front. Passed through Eastland fifteen or eighteen, possibly twenty, miles an hour. If the front train was running ten or twelve miles an hour and our train six, seven or eight, *there would be no necessity for a slow signal from the front train.* When I was a mile behind this train I was running *closer* to it than *five* minutes. If I had been in front of the cars with the tender in front of me, I would have been *more able* to see the front train than I was." (Rec., pp. 56-59.)

Shea, rear train conductor, witness for defendant, testified:

"We were *several* minutes behind Dashiel when we left Cisco. After leaving Cisco we stopped at Lem. Saw him (Dashiel) about one-half mile from collision. Next I saw him we were right on him. There was a straight track and *could see his red lights.* It was a very dark night. At time of collision I was looking ahead." (Witness speaks of said five-minute rule and admits that when they were half mile behind they were closer to Dashiel than five minutes.) "We were running at time of collision about ten miles an hour. When we passed Eastland were running *eight or ten* miles an hour." (Thus, he is contradicted by both Petry and Childress, who say that speed of rear train was fifteen or twenty miles an hour at *time of collision.*) "If the front train was running over ten miles an hour, 't was going faster than we. *It was just as difficult* for men in front to see how far we were behind as for us to see how far they were in front. *My train did not stop or slacken speed before collision* and was going up hill. A train going twelve miles an hour with our number of cars, should air be applied, would stop in 150 or 200 feet. I saw Dashiel lying on ground after the collision. He complained of back and leg and blood was running down his cheek. The curve was about 100 yards from Eastland de-

pot. When we passed Eastland we were the proper distance (that is, five minutes) behind other train. Had the air been applid in emergency *at the time I discovered* we were about to collide with them, we would not have hit them *as hard as we did.*" In reply to the Court, he said, if the air had been applied when he first saw them the collision *might have been avoided or lessened in degree.*

"Dashiel told me at Cisco he was going to let a section man off at Eastland section house, and Burke, the road master was with him."

We stayed at Cisco about three hours (other witnesses say about **4 or 5** hours).

It would not take *two or three* hours at Cisco, under conditions existing there, to turn our engine in *right direction.* The first view we had of front train was *after* we turned the curve at Eastland. Could not see them as we came through Eastland. It was a *quarter of mile east* of section house to place of collision. (Rec., pp. 61-64.)

Bowles, defendant's *expert*, testified: That curve is pretty near half way between the section house and depot. He thought it would be better to run train with engine in front. He saw Deshiel often before the accident. He was a bright, intelligent railroad man. He never knew of him drinking before accident, while in service of defendant. If a train slows down, and the train following is running *at a high rate of speed*, it is the duty of the conductor to flag him. (Rec., pp. 64-65.)

We will digress a little just here to ask this question: How on earth could it be reasonably urged that Dashiel would know, or even suppose, that rear train employees would be running their vehicle at a *high rate of speed*, and especially so, in view of the *personal warning* which, at Cisco, he had given rear train conductor, in presence of Burke, that he had orders to let a man alight at Eastland

section house? This personal notice to rear employees was better warning that front train, under orders from the road master, would necessarily be stopped or slowed down, to obey those orders, and such *direct* warning to rear train employees *was better* than the use of all the lanterns or red lights on the road. Hence, we claim that the special charges refused, on the question of contributory negligence, and elsewhere herein more fully discussed, were *wholly* inapplicable to the state of facts shown by this record, and the court acted justly when he declined to *emphasize* defendant's idea on the subject to any greater extent than submitted in his general charge and in the given special charges.

Ward, defendant's superintendent, on cross-examination admitted: "When a train has slackened speed to let off section man, is given signal at once to go ahead, the conductor and brakeman go inside, brakeman coals up the fire, the train has gained its normal speed, four or five minutes have elapsed, *there would be no necessity for flagging the train* if such circumstances existed. From Putman to Baird, west of Delmar, is 17 or 18 miles and would take about an hour to run to Baird. There was "Y" at Baird where engine could have been turned, With "Y"s full of cars at Cisco it would take from an hour to hour and a half to change engine to front of train." (Remember all witnesses agree that rear train stood at Cisco from three to five hours).

Dashiel was in defendant's service eight or ten months. Before the accident he was a sober man and was considered a good, competent railroad man and was *promoted* from brakeman to conductor over some older employees. The witness further testified that with switches and sidetracks connected with the main track, an engine could not be changed to front of train without making a "flying switch." (Rec., pp. 65-69.)

Cheek, in rebuttal, illustrates the real(?) ignorance of Ward on said "flying switch" proposition. (Rec., p. 74.)

Any tribunal that ever saw a railroad, by the aid of common sense and their judicial knowledge, would find said learning(?) of Ward nothing but *intolerable* ignorance.

Another "general superintendent" Scott, gave for defendant his *valuable expert experience.* On cross examination he admitted: "That good judgment would say it better to operate an engine in front of cars than to *push*, because the engineer has control and manipulates the brakes, *and if it can be done it ought to be.* With train running eight or ten miles an hour. (estimate of speed made by some defense witnesses), and everything in good shape it is possible to stop it one hundred or one hundred and twenty-five feet. (Rec. 75.)

The Court will note that a great deal of defendant's testimony found in the record derives its chief value (?) simply from being "expert." It was a kind of "speak the speech, I pray you, trippingly o, the tongue." Where a judge may inform a jury what effect shall be given certain testimony, we submit that upon the foregoing evidence of defendant, the trial Court would have been warranted on the issue of "assumed risk," negligence and contributory negligence in directing a peremptory verdict for plaintiff.

For the court to have followed suggestions in the assignments raising those issues and made the jury to have found for defendant, had been against the great weight of defendant's own testimony and would have ignored all physical facts and circumstances around the collision.

Had defendant in error introduced *no testimony* on said issues it had required a remarkable stretch of judicial conscience to have directed a verdict for the railroad. But let us reduce to an absurdity the contention for a "directed verdict," for such is the practical meaning of

all the assignments on said issues, by adding to the above the proof adduced by plaintiff.

Shall we argue the great difficulty to develop plaintiff's cause when your Honors can note the large percentage of the witnesses who were *still on* defendant's *pay roll*. It may be noted just here that defendant failed to enlighten the jury by the presence of *fireman* on rear train (and there is no testimony of his "death," as usually accompanies such omissions). All others on both trains told what was *supposed* to be the truth about the collision.

Cheek, front train brakeman, witness for plaintiff, testified: We had passed Eastland, had started up hill; I was riding on the engine, when I discovered anything wrong; something *drove us ahead*. The engineer and I looked at the air guage: it was all right, and then pretty soon we broke in two about five cars from engine. We were running at time of the accident "about *twelve* miles an hour. Our train was not at a standstill after passing Eastland. We could find nothing but *floor* of our caboose after collision. With little extra trouble they (rear train) could have put their engine in front. Could have turned engine around at Cisco. Work trains sometimes run backwards, but it is not usual to extend their limits over *two-thirds of a division and to that time of night*. From Eastland to place of accident we were running about eighteen miles per hour and slowed up no more than the up grade, that I know of.

Engineer began working steam after passing Eastland. Had air been set or steam shut off (on front train), I undoubtedly would have noticed it. A section man would get off a train running twelve miles an hour. The *first thing* I noticed wrong with our train was *at time* of the collision. We kept up same rate of speed from Eastland to place of collision. (Rec., pp. 19-22.)

We have quoted testsmony of Haire. (Rec., pp. 22-23).

We have quoted testimony of Petry. (Rec., pp. 23-25).

Wm. Childress was brought into Court, but was not placed on stand, by defendant. As witness for plaintiff in rebuttal, he testified:

I had never been over road as brakeman *before*. *My first trip*. I wore glasses that night. When I saw train in front I gave our engineer slow signal and then *jumped off*. Can't say how many signals I gave. (It will be noted that he did not give his engineer a *stop signal*.) . Air was connected with *our engine* about *six inches* from where I stood and was *accessible to me*. No air was applied. Had air been applied our train would have slowed down or stopped. We were running about fifteen miles per hour. When Dashiel's train was quarter mile ahead and we running fifteen miles an hour, that would give me but one minute to signal. If Childress had only one minute to signal his train was running faster than fifteen miles an hour. Because every witness swore that Dashiel's train was also running. Maddison said front train was running seven, eight or ten miles an hour, Cheek twelve miles, Berry ten or twelve miles, Kincaid ten or twelve miles an hour, at time of collision. Hence, it is *self-evident* that Childress was further than one-fourth mile back when front train was seen and signals begun, or he was running at terriffic speed as the "splintered" cabooses indicated. If front train was running up grade ten or twelve miles per hour and struck by rear train running up same grade fifteen miles per hour, the collision would barely have jarred the cabooses. If front train was going up grade ten or twelve miles an hour and struck by rear train with such force as to "kindlewood" cabooses and drive front train forward, breaking it in two, there is no guess work to say the rear train was running thirty-five or forty miles per hour, probably more.

Childress further said:

A man on rear of front train could see our train coming. They were aware that our caboose was in front. (He thus states no more than a *mere conclusion* because he further says the front train was a *little east* of section house *when I first observed it.*) He ran on *some distance* after seeing the lights *before* he began to give signals. (Rec., pp. 74-76.)

If Dashiel was east of section house when his train was first observed by Childress, did he have a better chance, that cold, dark night to see the rear train through said curve than had Childress to see Dashiel's train?

Admit that Childress stated a fact, not a mere conclusion, in saying Dashiel knew rear train was coming backwards, yet such knowledge must have arisen, if at all, after the rear train came out of said curve and in time and distance must have been in close proximity to the front crew.

Defendant put in evidence Dashiel's statement to his superintendent concerning the collision. It is but fair to bind defendant by the proof therein upon the question of negligence and contributory negligence. If defendant undertakes to contradict such proof, the same should be positive and satisfactory.

"We had gone about one-half mile or more from where section foreman got off when extra ran into rear of our train *wrecking caboose*, etc. I was on rear platform of our caboose when foreman got off; gave engineer signal all right *and he kept on going and answered my signal.* We was running ten or twelve miles per hour on straight track up grade. Two extras east * * * was coming east; WE BOTH HAD SAME ORDERS." (Rec., p. 85).

Too exacting would be the man for the ordinary affairs of life who could seriously argue before court, jury or

Appellate Tribunal that a freight train running ten or twelve miles an hour, up grade, conductor knowing train to follow must climb the same hill, *that both trains had same orders* and that he, before leaving Cisco, had gone to rear conductor, in the presence of the "road master" and told him *personally* that a man was to be let off at section house—that under such conditions the front crew should "flash light" and red-lantern the road way in order to further warn those already personally informed to be on the look out while plaintiff was discharging said orders of his road master.

Plaintiff in error would hoist as a petard said statement in plaintiff's way to [redacted] recover, but thereby it is "hoist on its petard" for the statement contradicts even a "suspicion" of contributory negligence or the reasonable assumption of any risk.

Bearing upon the question of defendant's negligence involved in the above assignments and evidence and sustaining the judgment of said Court of Appeals, we cite

AUTHORITIES.

Cars pushed in front of engine. Insufficient look out and excessive speed.

See: Trin. Val. Ry. Co. vs. Stewart, 62 S. R., p. 1085.

Backing without look out, etc.

Railway Co. vs. Crowder, 64 S. W. R., p. 90.

In backing train, engineer should see that proper lookout is kept and all the crew should be immediately at their posts.

Hamilton vs. Morgan's L. & T. R. & S. S. Co. (La.), 8 So. R., p. 586.

Want of proper lookout on *backing* train, whether or not negligence, should go to the jury:

Railway Co. vs. Eitzen, 39 S. W. R., p. 625.

Railway Co. vs. Hundt, 140 Ill., p. 530.

Engine running backward, pulling cars, tender obstructing the view, no one on footboard for lookout and *apply the air* and speed excessive, company liable.

R. R. Co. vs. Goss, 72 S. W. R., p. 94.

Speed from twelve to twenty miles per hour, track sometimes obstructed by horses, *train pushed by engine which could have been turned in front.* Such operation shown to be extra dangerous. Issue of negligence should go to jury and evidence held sufficient to support judgment. See:

R. R. Co. vs. Grimm, 25 Ind. (App.), p. 494; (s. c.) 57 N. E. R., p. 640.

Proven more hazardous to operate train with coach instead of engine in front, matter of negligence should go to to the jury. See:

L. & N. Ry. Co. vs. Scott's Adm'r, 22 Ky. Law R., p. 30; (s. c.) 56 S. W. R., p. 674.

The Court's general charge (Rec., pp. 90-94), went to the limits of fairness and impartiality upon the matters in the special charge refused. Two speeial charges involving the same issue were given at request of defendant and were thereafterwards rehearsed to the jury in the general charge. (See given charges, Rec., p. 89).

To have unduly emphasized defendant's contention by repeating on the same subject all day long could have had but the effect to lead the jury away from other facts, issues and circumstances connected with the trial, such a trial would have had not even the semblance of fairness and impartiality towards plaintiff.

An instruction which repeats and thereby gives undue prominence to a special feature of the evidence, as indicating contributory negligence, should be refused.

AUTHORITIES.

R. R. Co. vs. Thompson, 21 S. W. R., p, 139.
R. R. Co. vs. Shearer, 21 S. W. R., p. 137.

As to the sixteenth assignment of error (Rec., p. 114), we suggest: The jury saw and heard the many witnesses who detailed the facts and circumstances of the collision. They watched each witness as to manner, bias, prejudice and impartiality (if any), as from his lips came the details of plaintiff's misfortune. Aided by an able arbiter between the litigants they traversed the scene of the accident, noted its occasion from every standpoint, viewed it in the light of all the surroundings. The collision and its terrible consequences to plaintiff were by them traced to defendant's negligence. While the Court was not *bound by the verdict*, yet upon motion for new trial, he held again in review all the facts and details by which the award was given, and then added his deliberate, and, we think, just and intelligent judgment, against the contention of plaintiff in error.

Thereafterwards said Court of Appeals unanimously determined that the result below was just and right.

The verdict and judgments below, we are aware, do not bind this **tribunal,** but when sixteen men have combined their judgment in the lower court's result, may we not expect the same to have much weight in reaching a decision here?

Let us direct your attention to the fact that there were submitted to the jury only two elements of damage: (1) Expenses for doctors and medicines, and (2) permanent disabilities, if any. Physical and mental pain endured and to be endured and after trial expenses to be incurred in an effort to cure were plead and abundantly sustained by testimony, yet the charge eliminated all such items from consideration. Hence, how can plaintiff in error

reasonably complain at fairness of the charge as to the items and measure of damages submitted? See our petition (Rec., pp. 2-5) and charge (Rec., pp. 93-94). Upon the question of negligence and contributory negligence the general charge was: "Upon the issue of negligence of defendant company the *burden* of proof is on plaintiff and to entitle him to recover he must show by a preponderance, or greater weight, of the evidence, that he received his injuries *substantially* as alleged, and that they were caused *by reason of the negligence of defendant.*" (Rec., pp. 91-92).

As to operating train backwards and excessive speed, jury were told they must believe from the evidence that such acts on the part of defendant constituted negligence, must further believe plaintiff was free from contributory negligence and must further believe that plaintiff was injured in the manner alleged and submitted to you. (Rec., p. 92).

As to failure of rear crew to maintain proper lookout and violating said five-minute rule, it was charged: (1) That jury must believe from the evidence that such alleged acts and omissions on part of defendant constitute negligence; (2) must believe plaintiff free of contributory negligence; (3) must believe from evidence plaintiff was injured. (Rec., pp. 92-93.) Upon the measure and amount of damages, as a preface to that matter, the jury were told: "If you find upon the *whole case* in favor of plaintiff." (Rec., p. 93,)

It does seem that one must be hypercritical to find objection to the Court's charge upon the points above indicated.

As to plaintiff's damages the award was very moderate and fully warranted by the evidence. It would be useless further to cite the testimony on question of injuries.

AUTHORITIES.

In R. R. Co. vs. Flood, 79 S. W. R. (Texas), p. 1106, for the loss of sight in one eye there was verdict for $11,000 in favor of an engineer.

Injuries to brain and mind held to warrant verdict for $20,000.

See R. R. Co. vs. Brazil, 78 Texas, p. 314.

Also, R. R. Co. vs. Brantly, 62 S. W. R., p. 94.

Jurors are the recognized triers of fact, and when to their verdict is added the deliberate judgment of trial Court and of an able Appellate Court, then this **tribunal** will hardly disturb the verdict unless a manifest injustice has been done.

See:

Ins. Co. vs. Lathrop, 111 U. S., bot. pp. 537-540.

R. R. Co. vs. Powers, 149 U. S., p. 43.

Patton vs. R. R. Co., 179 U. S., p. 363.

Sup. Lod. K. of P. vs. Beck, 180 U. S., p. 745.

OBSERVATIONS.

A little human nature, a great deal of common sense and common experience ought to be exercised in reviewing the conduct of one working under orders, at his post of duty, performing his master's business with his mind on the particular work in hand.

Abstract principles of law, disconnected from the *light* of facts and surroundings, can not reasonably solve the situation of plaintiff. His vice-principal orders him to carry and let off said foreman. Both trains at Cisco, eleven and one-half miles from the collision, are laid out from three to five hours. Dashiel walks over to Shea and in presence of roadmaster notifies him of said orders. Besides Shae and he have the same orders with same instructions thereon. Was not such act as *much caution* on part of Dashiel and as *ample warning* to the rear crew, as

if from the front train when foreman alighted had been showered the "fireworks" of a Christmas eve celebration? After receiving such personal warning, rear crew knew that Dashiel's train would necessarily stop or slow down at or near section house and could not be under full headway immediately after so doing.

Could not Dashiel also rely upon the fact that he knew that rear crew had received such information and that they must also know of his situation relative to letting the man off and of again getting under headway? He knew the rear train ought to approach place of collision, not running thirty-five or forty miles per hour, *but under control after receiving said personal notice from him.*

It is not a case where front train employees must act on the presumption that another train might follow; but a case where front conductor **knew** the other train was to follow and as a matter of *great precaution* gives a personal notice of his intended action, taking, to make the warning *doubly impressive*, the roadmaster along while so doing.

Besides rear crew leave Cisco from five to ten minutes behind Dashiel. He knew there were side tracks and switches at Eastland. Lem and Cisco where engine could have been put in front, that use of "Y" at Cisco would have turned engine around. Could he not assume that rear employees *with road master aboard*, would operate in proper manner and with some care for his and their own safety. Eighteen or twenty miles an hour is speed of front train through Eastland and front crew pass there, so says one of them, at least five minutes behind Dashiel. Berry says he simply touched the air *lightly* when man got off, plaintiff's said statement to Ward is corroborated by three witnesses on front train that the speed thereof was *never less* than ten or twelve miles an hour.

Front train was "a little east of section house when Childress *first* observed it." Hence, it is self-evident that

if Dashiel *ever* saw rear train it must have been after Childress came out of curve and saw front train. Seriously, would it not take a very willing mind to deduce from said facts even a "decent suspicion" of assumed risk, contributory negligence or the violation of any rule applicable to Dashiel's situation? He knows his train is not running less than ten or twelve miles per hour, that rear train *must climb* the same hill, that rear crew has been warned as to letting off foreman, then where comes in the common sense necessity for "torpedoes or swinging lanterns," for brakemen to leave a train speeding *ten or twelve miles* an hour to warn a crew already *fully* notified? No rule applicable to his situation was violated, nor would ordinary prudence demand more to be done by Dashiel under the circumstances.

Relative to "assumed risk" charge, *we ask in all sincerity how could defendant in error on that cold, dark night*, have "complete knowledge and understanding" that rear train was not only coming backwards, *but was also coming at excessive speed, with no proper lookout and in admitted violation of said five-minute rule?*

Will impartial justice hold him barred as a matter of law by a mere "suspicion" that he knew the isolated fact of running backwards, when all fair men will concede that unless omniscient and all-seeing in that dark time, he must have been more blinded to said other acts and omissions of rear crew than he is to-day sightless in his once good eye.

We ask your Honors especially to see:

R. R. Co. vs. Chambers, 43 S. W. R., p. 1093, (Texas).

One injured from alleged known defects assumes only the *natural* ordinary risks of the service.

See Hough vs. R. R. Co., cited above.

Servant knowing an implement *in hand* defective, not

sufficient under the facts to cast absolute assumption of risk upon him.

See R. R. Co. vs. Babcock, above cited.

An engineer knew railroad track and the dangerous country through which it passed, but was ignorant that master would not do full duty for his safety in maintaining road bed. Refusal to charge on assumed risk, held no error.

R. R. Co. vs. O'Brien, above cited.

In R. R. Co. vs. Archibald, above cited, a charge similar to one in question was asked. Court struck out certain portions and gave remainder. Injured man knew certain methods adopted by master were attended with danger. This Court said: "The employee, on other hand, is not submitted to the danger of using appliances containing such defects, because of his knowledge of the the general methods adopted by employer in carrying on his business. Employee is not compelled to pass judgment on employer's methods of business or to conclude as to their adequacy." Further, it is said: "Measured by the principles just stated, trial Court not only did not err in striking out portions of instructions asked, but in the portions given stated the law *more favorably* to plaintiff in error than was sanctioned by true legal principles."

There is not a syllable in this record tending to show knowledge by Dashiel of said running backwards except the "bald-faced" statement of Childress to that effect. (Rec., p. 75). He first saw front train after he came out of curve and was about *mile* behind. Hence stated but a conclusion that plaintiff knew said manner of operation through that darkness. Besides, he does not state at what part of the mile said knowledge was acquired, whether at *time* of collision or otherwise.

The Court may ignore but a conclusion stated, or

seeing through a palpable falsehood, may refuse a charge based, if at all, upon such conclusion or falsehood.

Concede that said charge had ample grounds in the evidence, yet, had it been just to cull out a special feature from the several concurrent negligent acts and omissions charged, hold it high before the jury and thus in effect bar plaintiff, not only as to matter singled out, but upon all other negligent acts alleged.

Has not each member of this Court traveled through rough lands"? Have you not seen mountains shoot their towering heads far above the surface? Some times the loftiest peak has a summit so far above its fellows that sight and attention is lost except as to itself. Likewise, if such charge had been given it had been a tall peak fixing the jury's attention thereon and barring a view to associate issues.

All witnesses say that it was difficult for front crew to realize, through the darkness, the situation of rear train.

Where between Cisco and place of collision can it be reasonably urged that plaintiff's situation as to knowledge became so fixed as to justify him in abandoning his train, in taking to the woods and, possibly, climbing a tree to escape a "far sighted peril" acquired in the dark time? It must have been after rear crew passed Eastland at least five minutes behind Dashiel as stated by one of that crew. What would common sense and ordinary prudence have suggested the injured man's doing if across the shadows of that cloudy night he saw the other vehicle coming, right on him, rear end foremost?

He is running under orders and is soon to meet train No. 5, laden with defendant's passengers (see statement,

Rec., p. 85). He had no chance to resign or quit the service. To have abandoned his train on that hillside had crazily destroyed defendant's property in custody of both crews and had resulted in death or injury to all on rear train, running at such high speed as to splinter both cabooses, and yet, under such circumstances, the refused charge had made him assume such rish.

Had the special charge been the law of this case, plaintiff's situation had been governed by unreasonable conditions, and the law that contains not the elements of reason and human experience should never be applied by a just tribunal.

Fourth. Assignments of errors Nos. twelve, thirteen and fourteen (Rec., p. 113) all relate to the action of the Court concerning matters connected with said release and will be considered together.

Agreement as to transcript (Rec., p. 103, Sub. 5) shows that the original release, in its *original form is to* accompany the record, that its form, purport and manner of execution may be inspected by this Court. On pages 14, 76 and 77 of record said release is copied and there are also on pages 76 and 77 of the record certain agreed explanations concerning the same.

"All the words in the above described instrument except the date and signature and except the words 'bruising my body, right leg, right arm and giving me a scalp wound,' were in print in a form *already prepared before* the execution of the release. Said words, 'bruising my body, right leg, right arm and giving me a scalp wound' were typewritten and were incorporated into the first half or clause of said release *when the same was signed and executed by Dashiel.*" (Rec., pp. 76-77.)

We request the Court also to note that Dashiel, in describing the injuries specified in said first clause, uses this

language: "I sustained *certain* personal injuries in the manner and *of the character described.*" and then he follows a specific statement and *description* of the injuries in said clause specified.

Before passing on the question of pleadings concerning *said instrument and in* order to ascertain the true intention of the parties relative to the release, and, also, to ascertain the meaning of the terms and expressions relative to the injuries in said instrument set out, the Court heard *all* evidence of both parties bearing upon the injuries received by plaintiff, and their character and seriousness as to being existent, known and developed, or otherwise, when said release agreement was executed. After so doing, the Court allowed the instrument in evidence, as shown on page 77 of record.

In his charge to the jury, as to matter of injuries, the Court eliminated from consideration every injury except "impaired mental powers and partial loss of sight in his left eye." (Rec., p. 91.)

We submit that where there are general words alone in a release they shall be taken most strongly against a releasor; but where there is a particular recital, and then general words follow, the general words shall be qualified by the particular recital.

2nd, we further urge that if the terms and expressions of an instrument are such as to render it uncertain to the court as to what was the true intention of the parties in the use of such terms and expressions, then the court has the right, and it is his duty, to hear testimony touching the matters to which said instrument relates and to give the instrument such a construction as will obviate any latent ambiguity therein and express the real intention of the parties at the time of its execution, and to

ascertain what was contemplated by them when such terms and expressions were so used.

AUTHORITIES.

Union Pac. Ry. vs. Artist, 60 Fed. Rep., pp. 365-367.

R. R. Co. vs. McCarty, 94 Tex., pp. 302-303.

Ramsden vs. Hylton, 2 Vesey, p. 304.

Lumley vs. Railway, 6 Am. and Eng. Ry. Cas. (new series), p. 81 (s. c.) 76 Fed. R. 466

Parsons on Con., Vol. 2, p. 28 (ed. pub. by Little, Brown & Co. in 1855.

Jackson vs. Stackhouse, N. Y. Com. Law Rep., Vol. 7, bot. p. 460; (s. c.) 1 Cowan, pp. 122-126.

Hill vs. Miller, 76 N. Y. Ct. of App. Rep., p. 33.

Clark vs. Woodruff, 83 N. Y. Ct. of App. Rep., pp. 520-523.

Chitty on Con., 6 Am. Ed., p. 778*a* (Title Release).

Bacon's Abr. Release, K.

Payler vs. Homevsham, 4 M. & S. p. 423, 16 R. R. p. 516.

Above in all cases 115 Fed. R. 575

General words in a release are to be limited and restrained to the particular words in the recital. See:

Stonehewer vs. Farrer, 14 L. J., Q. B., p. 122.

Lyman vs. Clark, 9 Mass., p. 234-238.

In the last cited case the Court said: "It is a general and *reasonable* rule, that more general words in an instrument shall be restrained by other expressions more limited in the same instrument."

OBSERVATIONS.

Where the general printed words are in a form already prepared and among others laid away for promiscuous use, to bind a party by the general

words instead of by the particular words and specifications inserted by himself when he signs the instrument, is but to conclude him by a "unilateral contract."

Three special exceptions to defendant's plea in bar were urged by plaintiff (Rec., pp. 8-9).

Plaintiff further urged four special answers in reply to said plea in bar (Rec., pp. 9-13).

We call your attention to the fact that counsel for plaintiff in error both in the trial Court and in brief and oral argument before said Circuit Court of Appeals relied on the Artist and McCarty cases, above cited by us. (See their brief in U. S. Cir. Ct. App., p. 53).

In the Federal Courts the Artist case and in Texas the McCarty case, we take it, were the law of the land when so urged and when this trial occurred.

Both those cases *fully sustain* our contention relative to said release.

First, in the Artist case Judge Sanborn said:

"General words alone in a release are taken most strongly against the releasor. But when there is a *particular recital* followed by general words, the latter are qualified by the recital. The Court below properly applied this to the release in this case. The general words in the last half of it are limited by the *very specific recital* of the injuries that the $150 was to be a settlement of which is contained in the first half of the release. It was the claim for these injuries, and these only, that this release discharged the company from."

The McCarty case, 94 Texas, 302-303, refers approvingly to the language of Lord Hardwicke in Ramsey vs. Hylton, above cited. It also refers approvingly to said Artist case and to the case of Lumly vs. Ry., above cited.

"This case," said the Court, "is also clearly to be dis-

tinguished from the Lumly case and the other cases on that line. In those cases the contract was neither set aside nor impaired by reason of any mistake of the parties to the relaase. *There, by a rule of construction, the operation of the release is restricted to the particulars mentioned.* Here no *particular* injuries are mentioned. Here, then, the terms of the release are not to be mistaken and the contract is not open to construction."

Both parties having urged said cases below, those courts certainly followed well *recommended* decisions in affirming our contention.

In Jackson vs. Stackhouse, above cited, it is said:

"Thus, if a release acknowldges receipt of 10 pounds and thereof acquits and discharges the person of whom it is received,*and also of all actions, debts and demands, nothing* is discharged but the 10 pounds, for the last words are limited by the first."

In Clark vs. Woodruff, above cited, the court said:

"The language of printed blanks is easily assumed to be appropriate, without careful examination, while the written words more *safely and more nearly* indicate the intention of the contracting parties."

In 2nd vol. Par. on Con., p. 28 said (Ed, 1885), is this language:

"Instruments are often used which are in part printed and in part written, that is, they are printed with blanks, which are afterwards filled up; and the question may occur to which a *preference* should be given. The general answer is to the *written* part. What is printed is intended to apply to a large class of contracts and not to anyone exclusively; the blanks are left purposely that the special statements or provisions should be inserted, which belong to this contract and not to others and thus discriminate this from others.

It is reasonable to suppose that *the intention of the par-*

ties was more clearly given to those phrases selected by themselves, and which express the *especial particulars* of their own contract, than to those more general expressions which belong to all contracts of this class."

Bacon's Abr., above cited, says that where there are general words all alone in a deed of release, they shall be taken most strongly against the releasor: but where there is a particular recital in a deed and then general words follow, the general words shall be qualified by the particular recital."

In 2 Roll. Abr., 409, there is cited a case, which says: "If a man should receive £10, and give a receipt for it, and doth thereby acquit and release the person of *all actions, debts, duties und demands, nothing is released* but the £10; because the last words must be limited by those foregoing."

Permit, again, the suggestion that his Honor before ruling upon matters pertaining to, and in construing, said release first saw, heard and considered all thiugs in the testimony relative to the same, in order that he might the more clearly and justly determine the *contemplation and intention* of the parties involved in the terms and expressions of the instrument. Such action by the Court is shown by the whole record herein. His judgment thereon will, no doubt, be given great weight, by this **Tribunal** while passing, somewhat at "long-distance," on this question, especially when you consider that the trial Court submitted to the jury no matter of injury except those to brain and eye.

Specification of error No. 5 (Rec., pp. 110-111) complains that there was not a verdict directed for defendant.

Specification No. 6 (Rec., p. 111) urges that if Dashiel violated rules of the company, that he was guilty of negligence as a matter of law and thereby barred of recovery.

Specifications Nos. 7 and 11 (Rec., pp. 111-113) urge

that the Court should have repeated the submission in his general charge and in the requests granted at the instance of defendant whereby the jury were told that if Dashiel violated said rules, and that in so doing his conduct was not that of an ordinarily prudent person in the exercise of reasonable care under the circumstances, he could not recover.

As all said assignments substantially relate to same general subject we will treat them together.

FIRST PROPOSITION

IN REPLY TO SAID SPECIFICATIONS.

When a request for instructions refused is in conflict with the propositions of law contained in a request for instructions given at the instance of a complaining party, said request should be denied. It is improper to give conflicting requested instructions.

AUTHORITIES.

Tracey vs. Tuffly, 134 U. S., bot. p. 886-887.

SECOND PROPOSITION

UNDER FOREGOING.

When a party invites a court to grant a request for instructions not as favorable to him as the law would warrant, he is in no position to complain.

When a party invites a court to instruct certain propositions upon a supposed issue and the court accepts the invitation and gives the request, and thereafterwards substantially follows in his general charge the propositions in such request, the party should not be heard to complain of the court's gen-

eral charge on the subject, nor of the refusal to give other charges conflicting with the propositions in the granted request.

AUTHORITIES.

Max. Land Grant Co. vs. Dawson, 151 U. S., top p. 606, bot. p. 285.

THIRD PROPOTITION

UNDER FOREGOING SPECIFICATIONS.

Where a party requests an instruction specifying certain proposed acts and omissions of his adversary and therein incorporates the proposition that if said acts and omissions were not those of an ordinarily prudent person under the circumstances and are found to be the proximate cause of an injury, then to find for the party requesting; and where he requests practically the same instruction but leaves out the proposition that the jury may find the existence *vel non* of ordinary care under the circumstances; in other words, that said alleged acts and omissions, as a matter of law, constitute a bar to recovery, then the Court, having granted the request to charge in the first instance, and having substantially followed same in his general charge on the subject, may properly decline to submit said request containing a conflicting proposition of law.

AUTHORITIES.

Island & S. C. Co. vs. Tolson, 139 U. S., bot. p. 272.
So. Pac. Ry. Co. vs. Hall, 100 Fed. R., p. 760.

FOURTH PROPOSITION

UNDER SAID SPECIFICATIONS.

Where the pleadings of a party do not put in issue the violation of a rule, nor even of a usage and custom, but merely states certain acts and omissions as constituting contributory negligence and alleging that negligence to be a proximate cause of the injury, then said rules have no place at the trial except to illustrate, if they do illustrate, by way of evidence, said negligent acts and omissions, and it would be improper for the Court, either by general or requested instruction, to go beyond said pleadings and charge that a violation of said rule is a *negligence per se*.

Further: Evidence on an issue not raised by the pleadings involved at the hearing will not be considered by an Appellate Court.

AUTHORITIES.

Patton vs. Taylor, 7 How., pp. 158-159.

FIFTH PROPOSITION

UNDER FOREGOING SPECIFICATIONS.

Where the rule whose alleged violation is relied on as constituting *negligence per se*, does not specify any acts, conduct or omissions, the breach of which shall constitute its violation, but contains simply the broad statement that a certain supposition shall be indulged by those operating trains, and where the party assigning error has not plead the rule nor its violation, nor what constitutes its violation and where the great preponderance of, if not the undis-

puted testimony, shows no act or omission of the injured person not usual and customary, and not in accord with ordinary prudence under the circumstances, then the Court should refuse to charge either generally or upon request concerning said violation. The jury should at least be allowed to say whether the doing of the acts and omitting the things alleged against plaintiff, at a time and place when the undisputed testimony showed no rule applicable and no violation thereof, were in keeping with ordinary prudence under the circumstances.

AUTHORITIES.

U. P, Ry. Co. vs. Poirier, I67 U. S. bot, pp. 73-75.

This case substantially holds that whether or not there was a rule applicable, and whether or not there was its violation, depends upon a construction in the *light* of the facts, surroundings and exigencies. This was a rear end collision case, some facts of which relative to rules and otherwise were quite similar to the case at bar.

SIXTH PROPOSITION.

UNDER SAID SPECIFICATIONS.

Even could any view of the evidence tend to show that there was a rule applicable to plaintiff's situation and that the question of its violation was tended to be raised, and that as a matter of law he was barred of recovery, yet defendant would not be exonerated if the evidence further shows that defendant by the exercise of reasonable care and prudence, could have avoided the consequences of plaintiff's negligence, if any.

AUTHORITIES.

I. & S. C. Co. vs. Tolson. 139 U. S. bot. pp. 272-273.
Gr. T. R. R. Co. vs. Ives, 144 U. S. bot. p. 493.
Tex. & Pac. Ry. Co. vs. Nolan, 62 Eed. R., p. 532.
Chic. & C. Ry. Co., vs. Chambers, 68 Fed. R., pp. 148-152.
Balt. & C. Ry. Co. vs. Hellenthal, 88 Fed. R., pp. 116-121.

SEVENTH PROPOSITION.

UNDER FOREGOING SPECIFICATIONS,

Where a train is operated wrong end foremost, without lookout, at excessive speed and in admitted violation of defendant's five minute rule, in the same direction of another train, *known to be in front*, there exists such a want of supervision and management of the vehicle as to be dangerous in itself and is, of itself, evidence of negligence.

AUTHORITIES.

I. & S. C. Co: vs. Tolson, 139 U. S. bot. p. 271.

EIGHTH PROPOSITION.

UNDER FOREGOING SPECIFICATIONS.

Where the general charge on a subject is in accord with a request for instructions given, and fully covers the ground in so far as the evidence reasonably warrants, further requests should be refused.

It is not the duty of the court to instruct where the instructions demanded assume a theory of fact *unsupported* by the evidence, or *contradict* the evidence.

AUTHORITIES.

As to first paragraph above:

Klein vs. Russel, 86 U. S., bot. pp. 124-125

As to second paragraph;

R. R. Co. vs. Horst, 93 U. S., bot. pp. 889-900.

NINTH PROPOSITION.

UNDER FOREGOING SPECIFICATIONS.

Where the transcript shows the general instructions on a subject consistent with a special request for instructions given at the instance of a complaining party, and especially where the record shows that the charge was not excepted to in the particulars complained of while the jury were at bar, and further, the transcript shows that on motion for new trial no errors were urged to the charge in the particulars complained of on appeal, then an appellate Court will not review said charge.

AUTHORITIES.

Phelps vs. Mayer, 15 How., p. 161.
Barton vs. Forsyth, 20 How., p. 533.
Tucker vs. U. S., 151 U. S., p. 170.
Humes vs. U. S., 170 U. S., p. 212.

TENTH PROPOSITION

UNDER SAID SPECIFICATIONS.

The doctrine in Texas on the question of rule violation is that when there is no statute fixing the duty, it is for the jury to say whether or not either party failed to exercise such care in the particulars charged as would have been exercised by a person

of ordinary care under the circumstances, and it is error for the Court to charge that any particular state of facts constitutes negligence in the absence of a statute so declaring, and especially should rules or customs not be given the effect of a statute when the same are offered as mere evidence of negligence, *vel non*, and are not pleaded in bar to recovery.

AUTHORITIES.

R. R. Co. vs. Harris, 51 S. W. R., pp. 864-865.

We ask your attention, in this connection, to R. R. Co. vs. Pitts, 42 S. W. R., p. 260, in which a rule was offered with certain acts and omissions therein specified, the violation of which were prohibited with an addendum of "all similar imprudences." (The one at bar specifies *nothing*, but *vaguely* states that trains shall be run under the "*supposition*," etc.). The Court said: "We think the rule was *irrelevant*, as it does not appear that plaintiff has done any act prohibited by it. The clause in regard to imprudence does not determine what acts other than those instanced are imprudent. *That* the evidence must show, and the Court submitted to the jury whether or not plaintiff had acted imprudently. If he was not imprudent, the rule did not apply."

Under this proposition we also invite your attention to Ry. Co. vs. Hiltner (Ky.), 60 S. W. R., p. 5, a collision case, which we think specially applicable, in view of the fact that the Court's general charge on the subject under discussion almost literally follows defendant's plea of contributory negligence, and was practically a transcript of the request given at the instance of defendant.

The Court said: "So far as we are aware, an unsuccessful litigant has never procured a reversal of a case

because the Court gave an instruction to the jury upon a given subject in the exact terms asked by him." Held that one can not assign for error an erroneous instruction obtained on his own application. How much less is the defendant entitled to a reversal in this case, when he got the instruction which he moved the Court to give on the subject of contributory negligence?

STATEMENT AND ARGUMENT.

The status of the record as to pleading, general and special charges given and the evidence adduced, did not authorize the Court to grant the requests for instructions on the subject of rule violations and the general and special charges given were, under the evidence, far more favorable to plaintiff in error than it had a right to expect.

Defensive pleading set out no rule nor its violation. It merely stated certain alleged acts and omissions by Dashiel, said they were negligent and as such proximately caused the injury. (Rec., pp. 6-7). Rule No. 13 (Rec.. p. 87), in so far as authorizing *any* general or special charge, has no place in the record, because there is no testimony that Dashiel's train ever stopped.

At request of defendant the Court gave the following charge: "In determining the question of *the negligence of Dashiel,* it is your duty to take into consideration the facts surrounding the situation. You should take into consideration the fact that he knew, or ought to have acted upon the presumption that a train was following or liable to be following him, and the fact that he had caused the speed of his train to be lessened, and the position and place of the

train, AND FROM ALL THESE FACTS DETERMINE WHETHER OR NOT A REASONABLY PRUDENT PERSON IN THE EXERCISE OF ORDINARY CARE WOULD, BY SOME PROPER SIGNAL, HAVE NOTIFIED THOSE UPON THE REAR TRAIN OF THIS FACT. It was the duty of Dashiel to use reasonable care to protect his train, and if he failed in this respect and such failure caused and contributed to the accident, that is to say, but for such failure on his part, the accident would not have occurred, then they will find for the defendant, even though there was negligence on the part of those upon the rear train." (Rec , p. 89).

If we parallel this charge with said plea on the subject, we find it substantially a copy thereof. If we also parallel the Court's general charge on the subject (Rec., p. 93), we find same to be practically a transcript of defendant's pleading and of its given request.

The Court also charged (Rec., p. 93): "If proper regulations have been established by the company it is relieved from liability for injuries resulting from a violation of the rules by an employee when the injury is the direct and proximate result of such violation, but not otherwise."

We ask your attention to the fact that defendant, while the jury were at bar, suggested to his Honor no exception to the charge upon the question under discussion. (Rec., pp. 94-95).

In its motion for new trial plaintiff in error, urged no such objections. (Rec., pp. 16-17).

Rule 14, Rec., p. 87, states in vague indefinite lan-

guage, that trainmen shall run under the supposition that another train follows. When it became necessary for defendant to interpolate said rule by the acts and things to be done by the trainmen, while indulging said supposition, and when the acts and things done by Dashiel, under the supposition or knowledge that a train followed, were consistent with ordinary care and prudence, then the rule could have no application in so far as demanding a general or special charge on the subject of rule violation.

The evidence shows that no act or omission of Dashiel was inconsistent with ordinary care under the circumstances, that his conduct, supposing or knowing a train to be following, was all that ordinary prudence would demand; that he was not guilty of violating said rule 14, and that there was not sufficient evidence tending to show him so guilty to authorize a charge thereon.

Berry, witness for defendant, testified: "I was *just passing section house* when I turned on the air; foreman got off a little this side of the section house; Dashiel told me he had a section man to let off there, gave signals to engineer; he didn't take the signals and I touched the air *lightly*. This slowed down the train, he says, to ten or twelve miles an hour, and that train was running before that fifteen or twenty miles an hour. As defendant relies upon this witness to establish contributory negligence, we urge that the train is proven to be running by him fifteen miles an hour before he touched the air, and that it only slowed down to twelve, in other words slacked its speed just to extent of 1-5. He further says: "I suppose it was very near 1-2 mile from place of accident to the section house. After I got back in caboose I put coal in the

stove, that took *four or five minutes.* Track was straight and both trains going up hill. (Rec., pp. 55-56.)

We ask the Court to note that the train slackened speed only to ten or twelye miles an hour. This witness says: "Foreman got off a little this side of section house." He further says: "I suppose it was very near one-half mile from place of accident to section house." Other witnesses say that speed of train at time of collision was from ten to twelve miles per hour. We have then a train going ten or twelve miles per hour for a space of four or five minutes after section man alights until the collision. Then it must have been a *very little east* of section house, according to testimony of this defense witness, where the foreman alighted.

Kincaid, another defense witness, states on cross-examination: "It was *not very far* from the wreck to the section house. (Rec., p. 52.) At time of collision I don't think our train was running *over ten or twelve miles* an hour." (Rec., p. 53.)

Madison (Rec., pp. 47-50,) was the most favorable witness for defendant, and his testimony was so contradictory of every other witness and so contradictory of itself that it was entitled to but little, if any, credit. On page 47 (Rec.) he says: "When I got the go ahead signal, we were running about eight miles, I suppose." This was not quite strong enough for *defensive* purposes, and on same page of record he says: "I was running probably six or seven miles an hour." On same and next page he further says: From time air was turned on until the collision, it must have been *five, six or seven* minntes. (Which?) On page 48 he also says: "If a train '*breaks down*' between stations it is the duty of the conductor to send back a breakman to protect the train; if another train is following, conductor can give them a signal to stop or slow down." (Please note that there is not a *syllable* in

the record even tending to show that Dashiel's train had *broken down*, or was even in the neighborhood of so doing.) On page 49 he says: "I think *probably* (?) we were running seven miles per hour at time of collision. On same page he says: I last saw rear train in neighborhood of a mile and a half west of Eastland, and the first time I saw it was at Eastland."

On pages 49-50 he says: After the signal was given, I suppose we run about *three-quarters* of a mile before collision occurred." Seeing this not good for defense, he says, *No*, he don't believe this true, but that something else is better. He further says, page 50: "When air is applied in case of that kind and you have to start up, and your train is slowed down, there is more or less danger of its breaking in two; *that is the reason it is necessary to send a flagman back.* Man with lantern at night is called flagman. *I would not consider it necessary to send a flagman back if you are running eight miles an hour.*

Defendant put in evidence statement of Dashiel to his superintendent. (Rec., p. 85.) Therein he states that "*we were running ten or twelve miles per hour on straight track up grade.*" Thus corroborating Berry, Kincaid and Cheek as to speed of train.

The foregoing is all the evidence upon which defendant could rely to support its plea of contributory negligence. Would an impartial, or if you please, even a critical mind, hold Dashiel violating said rule in declining to swing lanters across the track, "bomshell" the rails with torpedoes, or send panting "flagman" back when his train was running twelve miles an hour, and when Berry says its speed was only lowered from fiteen down to twelve miles per hour? Especially can it be so held, when Madison says it is *not necessary* to send a flagman back *if your train is running eight* miles an hour, and when it is remembered that Dashiel at Cisco tells rear conductor a section

man is to be let off, thus personally inviting him to be on the lookout? Under the situation, as thus developed, would fairness suggest that said rule should be interpolated by actions and precautions on part of the injured man any more careful and thoughtful, in order that he might fall without the precinct of rule violation and contributory negligence? To urge that torpedo bombardments, swinging lanterns and "Christmas eve flashligts" should apply to his *afore-notified* situation and his speed of train, as sworn to by defense witnesses, it seems to us a glaring absurdity, and if such action on his part was not requisite, then said rule was inapplicable and the Court's charge on the subject was much more favorable to plaintiff in error than it had a right to demand.

But plaintiff's testimony, supplemented by other than above defense witnesses, illustrates the conduct of Dashiel to have been all that prudence and care could have demanded of ordinary mortal.

Cheek, witness for plaintiff, said he was riding on the engine, head brakeman. Had passed Eastland and started up hill, when something drove us ahead; broke into about five cars from engine. We were running at time of accident about twelve miles per hour. (Rec., p. 19).

When we left Cisco we ran at a rate of about eighteen miles an hour, and after passing Eastland to time of accident, did not *slow up any more than the up grade* that I know of. Didn't make any perceptible decrease in speed from Eastland to place of accident, that I noticed.

If the air had been set or steam shut off I would undoubtedly have noticed it. (Rec., p. 20).

The first thing he noticed wrong with his train, after leaving Cisco, was when the train gave a sudden start forward and then a jerk, and then broke in two, which was *at time of collision.* (Rec., p. 22). He further says:

"We could not find anything of our caboose *but the floor.*"

Wm. Petry, witness for plaintiff, testified: "When I last saw Dashiel's train, about a mile before the accident, *it was moving along in an easterly direction.* Our train backing about fifteen or twenty miles an hour at time of collision. (Rec., pp. 23-24).

Swick. witness for defendant, said: "At time of the accident we were running about seven to ten (which?) miles an hour: we were going up grade." (Rec., p. 58).

Is it possible we have all been dreaming about this collision? The Court, jury, lawyers, etc., connected with that trial may wake up before long and find themselves wearing "Rip VanWinkle" whiskers, that is, if Swick told the "whole (?) truth."

He further says: "If the front train was running 10 or 12 miles an hour, and our train 6, 7 or 8 miles an hour there would be *no necessity for a slow signal from front train.*" Thus, does not its own witness make defendant's *supposable* rule of conduct inapplicable to plaintiff's situation? (Rec., p. 58).

Defendant offered in evidence the letter of plaintiff to his superintendent concerning the collision, in which he says: "*We were running 10 or 12 miles an hour on straight track, up-grade; we had four red lights on rear of our caboose, all burning good.*" (Rec., p. 85).

Ward, defendant's superintendent, testified: "If train should *stop* it would be duty of the conductor to direct flagman to go back with red lantern or torpedoes and warn approaching train." (Remember, no witness swore train ever "*stopped.*") "In event train slowed down and did not come to stop he *generally* directs his flagman to stand on the platform and see that rear of train is protected." (Rec., pp. 67-68).

On cross-examination he said: "When a train has slackened its speed, say to let a section man off, and there is given a signal at once to go ahead, conductor and brakeman go into the caboose; brakeman puts coal on the fire, the train has gained its normal speed, *four or five* minutes having elapsed, *there would be no necessity for flagging the train if such circumstances existed.*" (Rec., p. 68). Please bear in mind that defense witness, Berry, swore that he merely touched the air *lightly* when foreman alighted, that his train lessened its speed from 15 down to 12 miles an hour, or only to the extent of one-fifth. Also, that defense witness, Kincaid, said at time of collision front train was running ten or twelve miles an hour; that Berry said four or five minutes had elapsed from time foreman got off till time of collision. That defendant proved by said letter of Dashiel that his train at time of collision was running ten or twelve miles an hour on straight track.

We ask you in this connection to note that Cheek, head brakeman on front train, said: "After passing Eastland to place of accident did not *slow up any more than the up grade*, that I know of. Didn't make any *perceptible decrease* in the speed from Eastland to place of accident, that I noticed." (Rec., p. 20.)

Thus it seems apparent that under the conditions existent, defendant's superintendent suggests the absurdity of the rule in question being at all applicable to plaintiff's situation. In other words, that if the speed of front train, the place of collision and the attending circumstances showed that Dashiel did no act, nor omitted any thing requisite of an ordinarily prudent person so situated, then the rule, even interpolated as aforesaid, should not be deemed violated by him.

Shea, conductor on rear train, like Schwick in many respects, so contradicts himself, and in fear of not putting the facts strong enough for defendant, is so much im-

peached by all other witnesses and the circumstances of the collision, in several particulars, as to render the *shaded* part of his testimony unworthy of belief.

But he says something that makes the contention of plaintiff in error that Dashiel on the occasion acted otherwise than with ordinary care, simply preposterous.

In speaking of the necessity for signals and flagmen, he says: "When a train is running between stations, the conductor should protect his train from following trains in event it should happen that he should have to *stop*. Where a train is running between stations and it becomes necessary to stop or slow down for any purpose, and a train is following, it is the duty of the conductor to send a *flagman back* to warn approaching train (of what?) that he is *stopping or about to stop*." (Rec., pp. 61-62.) His said interpolation of the rule, is thus seen to be based on a theory of fact that has no existence in the testimony. Plaintiff's said letter, corroborated by Kincaid, Berry and Cheek, we think renders it indisputable that his train neither *stopped* nor *was about to stop*.

Maddison, front train engineer, puts the probable speed of his train at eight miles an hour. While Cheek says that there was no *perceptible decrease* in the speed except in so far as the natural and ordinary up-grade decrease. Besides, Shea says at time of accident we were running about ten miles an hour, and when we passed through Eastland we were running eight or ten miles an hour, (thus contradicting Schwick, who says they passed that point at twenty miles an hour, and every other witness says that speed through there was from fifteen to twenty miles an hour). Shea further said: "We hadn't increased or diminished our speed much. We were not running fifteen or twenty miles an hour at time of accident." (Rec., p. 62.) (Thus contradicting both his brakemen, who say it was from fifteen to twenty miles an hour.)

Shea's train going ten miles an hour, or even more, there was no necessity on earth, according to Schwick, Maddison and Ward for the train in front, running from ten to twelve miles an hour to "flashlight its end and sky-rocket" the roadway, even had plaintiff not taken the extra pains and caution personally to tell Shea at Cisco that Burke, roadmaster, had ordered him to carry and let off the section man, so that Shea could be on the look-out for front train.

Would not impartial justice declare this act of Dashiel fully commensurate with the demands of ordinary prudence? The very best notice to rear train that there was to be a section man let off was personally given to its conductor. When the speed of Dashiel's train is shown by practically all the evidence to have lessened not to a greater extent than one-fifth at any time before the collision; when he knew he had, even under the most exacting demands of said rule, done an act which all fair-minds ought to concede the greatest possible caution on his part and the best warning to the rear crew, the personal notice so given; when he knew said rear crew had to go up the collision hill, and that, too, with said personal warning in their minds, then we ask your Honors, in all candor and sincerity, did he not do as much for the protection of his own and rear train as the strictest obedience to said rule would demand of any one under the circumstances? If so, then the evidence neither shows nor tends to show any violation of rules, and such being the status of the case, his Honor by both the general and special charges given on the subject, submitted the matter far more faforably to plaintiff in error than it could reasonably have demanded, even had said general charge been properly excepted to and complained of, and even had said special charge on the subject not been given in the language requested? He violated no rule when he *knew* that Shea's

train was to follow and took personal precaution to warn Shea: "You be on look out for my train; Burke has ordered me to let off section man."

On page 62 of record Shea says: "MR. DASHIEL TOLD ME AT CISCO THAT HE WAS GOING TO LET OFF A SECTION MAN AT EASTLAND SECTION HOUSE, AND MR. BURKE, ROADMASTER, WAS WITH HIM. The section house is about a quarter of a mile west of where the accident occurred."

Had the evidence shown Dashiel violating a rule and guilty of contributory negligence, yet if employees on rear train might by the exercise of reasonable care in the premises, have avoided the collision and injury, then they were guilty of negligence in not so doing, and their negligence may be regarded as the last, direct, efficient and proximate cause of the injury.

As we understand the authorities cited under our proposition above on this question, it makes no difference whether or not the pleadings of the injured man allege, in reply to contributory negligence, said last negligenee as the proximate cause of the injury, especially when the undisputed testimony shows defendant's negligence the last and most proximate negligence.

Defendant at the trial recognized the above modification of the doctrine of negligence and contributory negligence, in the latter part of said request given. (Rec., p. 89). "It was the Duty of Dashiel to use reasonable care to protect his train, and if he failed in this respect, *and such failure caused and contributed to the accident, that is to say, but for such failure on his part, the accident would not have occured, then they will find for the defendant, etc.*"

Under this requested charge, the jury had a right to

say whether or not the said last negligence of rear employees was the proximate cause af plaintiff's injury.

We submit, that no difference how many signals or swinging lanterns had reddened the rear end of front train, whether it was speeding ten or twelve miles an hour or at a greater or less rate, or actually at a standstill, yet this collision would have occured in any event and that no difference what the situation of front train was, had the rear employees exercised even *half ordinary* care in the premises the collision could have been averted.

First. As to conduct of Swick, engineer of rear train.

Rule No. 2 (Rec., p. 74) was introduced as applicable to him. "All trains will be run under directions of conductors except where their directions conflict with rules, *or involves risk*, in which case the engineer will be held *equally responsible.*" We think every witness who spoke on the subject said that running a freight train backwards in the dark time, with engine on wrong end and pointing in wrong direction involved more risk than if operated in regular manner.

Swick says (Rec., p. 57), if air had been turned on his train by caboose brakeman it would have slowed up or stopped the train. If turned on full it would not be *long* stopping. On page 58 he says:

"I saw the train about *a mile before* the collision, *that is the last time I saw it.* I saw no signal between that time and time of collision from rear brakeman, Childress. I *knew* there was a train in front of us. It is requisite that I should be on the safe side and keep a *vigilant lookout ahead.* I had appliances on engine by which I could have *readily stopped* the train. If I had been in front of cars with the tender in front of me, *I would have been more able to see the front train than I was.*"

Seriously, what will this Court think of a man, when measured beside ordinary care, who will operate his train

wrong end foremost, admitting that he *knows* another train is *in front*, his engine and face in wrong direction, who for a mile before collision and in point of time four minutes, according to speed stated by Childress, and for a longer time according to his own statement of speed, never looks back to see over or into what he is running or about to run nor to catch the signals of Childress, if given, as hereinafter stated.

We suggest that if a "rainbow" of signals had accompanied front caboose, that vigilant engineer had never seen them during that mile of his incaution. The record does not show Dashiel laid off during *one moment* for any contributory negligence, but it does show (Rec., p. 58) this careful (?) engineer no longer in defendant's operating department. Were not the jury warranted by the lips of this witness in convicting defendant of a *last negligence* as the proximate cause of the injury?

Wm. Childress was serving as head brakeman while the regular man, Petry, was in the caboose warming. Let's see if collision could have been averted after he *saw* that rear train was running too fast toward and near to front train.

"When I saw train in front of us I gave our engineer a signal; I gave him a *slow signal*, and then *proceeded to jump off*. Can't say how many signals I gave. Our train equipped with air down at end of car—that is the air appliances. *It was about six inches from where I was standing, accessible to me and connected with the engine.* I did not apply the air. If engineer had applied it train would have slowed down or stopped. At time of collision we were running 15 miles an hour." (Rec., pp. 74-76). A jury of practical men no doubt would reason that after this "vigilant" brakeman discovered the necessity for action he might, by exercising any kind of care and foresight, have not only given signals to his engineer, but also have

applied that air accessible to him which would *certainly* have stopped his train, going *up grade*, in a shorter space, according to all the witnesses, than one-quarter of a mile.

A jury could reasonably conclude that it was the ordinary duty of Childress not to *jump off*, but to suppress his "*yellow streak*" long enough to apply that air, and if they so concluded then they must trace the last negligence to defendant as the proximate cause of the injury.

Shea, rear conductor, on this question, said: "We had three cars and a caboose and were running up hill. A train running twelve miles an hour with that number of cars, should the air be applied, would stop within *one hundred and fifty or two hundred feet.*" (Rec., p. 62).

Remember, that both he and Swick place the speed of their train at less than twelve miles an hour at time of collision. He further says: "When I realized we were going to have a collision, we were right on him; (evidently nearer than when Childress so realized it), *if the air had been applied in emergency at the time I discovered we were about to have a collision*, we would not have hit them as hard as we did." (Rec., p. 63).

The Court: "So that if the engineer had been where your caboose was, or the engineer having command of the air, had applied it at the time you saw the train in front of you, or a minute or two before the accident, it might have been avoided or lessened in degree?"

Answer: "Yes, it might." (Rec., p. 63).

We think it useless further to cite evidence on this question. This witness in reply to both Court and counsel states that if air had been applied in emergency, the collision would not have been as hard and might have been avoided. A jury could hardly conclude otherwise than that this last negligence of defendant was the nearest in cause to the injury.

Finally, we submit upon the whole record, that even if it be argued that Dashiel violated a rule or was contributorily negligent, yet that the collision might have been avoided if the conduct of the rear employees in the premises had been commensurate with ordinary prudence, and that hence this verdict and judgment under the evidence, are correct and that any charges given or refused on the question of rule violation become immaterial to the decision hereof.

FINAL ARGUMENT.

Upon the whole case we urge that the verdict and judgment were right. A young man, just in the domain of profit and usefulness for himself and others. During the ten months of his service for defendant, before this accident, strictly upright and sober. Such a thorough bright and intelligent railroad man, that within less than eight months from the time of his employment, he is promoted in the service from brakeman to conductor by his superintendent, and that, too, over other and older men in the service. (Ward's testimony, Rec., p. 68.)

Neighbors, friends, relatives, with one accord, all say that his appearance, conduct, etc., are such and so changed that they do not hesitate to pronounce him unsound of mind. Many good physicians unite in declaring him mentally deranged. Found by Doctor Mullins to be practically blind in one eye. (Rec., pp. 28-29.)

A physical wreck, with mental and nervous health completely shattered. Often while trying to work, and at other times, seen holding and pressing his aching head in his hands. Nearly all the lonesome night, while others around are surceased in slumber, relaxing from the day's toil and being refreshed for the morrow's battle, he is seen tossing from side to side, his sleep but fitful, or sitting on beside, aching head pressed in hands and trying

to moan away his pains and mental distress. This sleepless, restless victim of the incaution of others—can a hell on earth more than picture his unfortunate state? As helpless as a babe as to self-support and protection, during the useless remainder of his life, he must be cared for and protected, if at all, by friends and relatives. Parsimonious must be the purse, conceding not to this man that the amount of the award is but small compensation for the injuries suffered and to be endured.

Respectfully submitted that the verdict and judgment below were correct, and we ask an affirmance thereof.



Attorney for G. H. Dashiel, Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 212.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

GEO. H. DASHIEL, DEFENDANT IN ERROR.

Supplemental Brief and Argument for Defendant in Error.

MAY IT PLEASE THE COURT: Not having seen opposing brief until about time this cause was submitted, we reply in this supplement to some positions taken in said brief.

The record shows that in the trial below the release was first plead and exhibited on the day trial began (Rec., pp. 7, 15); that when so filed defendant in error thereto replied, as shown by the Record, pages 7–13; that one reply was of mental incompetency to execute release (Rec., pp. 9–10), and another that injuries to his skull, brain, and eye were *unknown* to both parties when release was executed (Rec., pp. 11–12). Opposing brief states that Dashiel (p. 4 of Brief) at trial abandoned issues of mental incompetency and of mistake as to his injury and offered no proof thereon.

Such statement is not warranted by the record. On the contrary, both parties offered testimony on those issues.

First. On issue of incompetency, see testimony of Mrs. Dashiel (Rec., p. 44); of Whitsitt (Rec., pp. 46–47); of Redford (Rec., pp. 33–34); of Naylor (Rec., p. 39); of Lane (Rec., p. 40); of Shahan (Rec., pp. 38–39).

Second. Did defendant in error abandon issue that *neither* party knew his skull was fractured and insanity and serious injury consequent thereon when he executed release? The statement has no foundation in the record. That such injuries were unknown and not contemplated by either party in the settlement is shown by *undisputed* evidence. Dr. Saunders, company surgeon (Rec., pp. 69–70), said that the injuries he found soon after accident were superficial and slight; that insanity could not result therefrom; that he did not find skull-bone *broken*. "That insanity would not result from a scalp wound," the *character* of injury described in release by plaintiff.

Hence, as to this company agent, there was a mistake of a *past and present fact*, the existence of a serious injury when release was executed. Dr. Frost on night of injury saw plaintiff for only a short time. He states: "Injury I found" (he is speaking of "scalp wound") "was on left side of head. *At that time* I did not think that would amount to *much*" (Rec., near bottom of p. 30). He further says that "only a *scalp wound* would not produce insanity" (Rec., p. 31, near middle). He did not regard scalp wound *commensurate* with skull fracture.

Ward did not know that plaintiff's skull was fractured when plaintiff described injury as *scalp wound* to the best of his *knowledge* (Rec., p. 66, near middle of page). To the effect that plaintiff appeared not injured.

It is conclusive, we think, that Dashiel was wholly ignorant of a serious head injury, from his statement to Ward that he would be "able to work in a day or two" (Rec., p. 66). August 13, 1901, Dashiel applied to a railroad for employment (Rec., p. 81). He states in the application that "I

never had any bones broken" (Rec., p. 82). Besides, said application shows that his eyesight was then considered good. This application having been introduced by the railroad, the statement therein concerning plaintiff's want of knowledge of his fractured skull, even long after release was executed, was certainly viewed by the trial court as strong proof that plaintiff was *ignorant*, as alleged in said plea No. 3, of his serious injury.

The railroad contending that no *serious* injury when release was signed, or at any other time, was known, and Dashiel urging that he was seriously injured in his skull and head when he signed, but that such fact was wholly *unknown* to him at the time, it was certainly proper for the court, upon the foregoing and other testimony in the record, to find peremptorily that there had been a mistake of fact as to a serious injury and of serious consequence to the injured man.

There is no evidence in the record showing that either party had any knowledge that his skull was fractured (a past and present fact) when he signed release.

We urge that the court upon the undisputed testimony, even independent of the terms of the instrument, did not err in construing same as not including the injuries for which plaintiff sought damages, and in telling the jury that injury to skull, brain, and eye was not intended by the parties to be released. The pleadings authorized him to hear testimony on such issue. He could but reach the conclusion (and could so inform the jury) that the serious injuries were not known and contemplated when release was signed. He was warranted to construe the release, either in connection with the matters on its face or independent thereof, *as not including* fracture of the skull and consequent results.

That Dashiel's skull was fractured and that insanity and loss of eye therefrom resulted, see testimony of Dr. Harper (Rec., pp. 36–37), Dr. Bordus (Rec., p. 32), Dr. Pring (Rec.,

p. 25), Aber (Rec., p. 25), and there is other testimony of like effect.

Contention of plaintiff in error that trial court, in construing the release and in submitting matter of injury to the jury, was guided only by matters upon the face thereof is not consistent with the pleadings and with said evidence concerning the character of the injuries *known* to exist when release was executed and thereafterwards.

Where the face of an instrument (as we believe does the one herein) shows that the specific injuries set out are of a certain *character*, and are so described, and are within the "*knowledge*" of the releasor when he signs, then the trial court may, we think, from the face thereof, derive the intention of the contracting parties and so construe the instrument as truly to express their real intention.

But in such a case it by no means follows that the court may not go further and hear evidence touching the situation of the parties relative to what they *knew* or did *not know* concerning the *character* of injury they had in contemplation, and especially may such course be taken when there is a prayer to that effect in replication to a plea in bar, as herein appears. The whole record herein shows that trial court, acted not alone upon the face of the release, but in giving it a construction, did so in the light of testimony of both parties pertaining to the issues of fact set out in plaintiff's replications Nos. 1 and 3 (Rec., pp. 9, 10, and 11).

The release was practically the last offered testimony (Rec., pp. 76 and 77). When so offered the court held that plaintiff was not deranged at time of its execution to such extent as to avoid release entirely. His remarks "because that release has not been set aside" makes it plain, we think, that he had permitted the parties to introduce testimony relative to the issue of fact raised by replication No. 1 (Rec., pp. 9–10), and is further shown by the testimony above referred to.

We think it clear that the court had considered all testi-

mony of both parties concerning the injury to skull, brain, and eye not having been known when release was executed, and that he considered same not only in connection with the *intention* to be deduced from face of the instrument itself but also as viewed in the light of our special answer No. 3 and evidence adduced thereon (Rec., p. 11).

On page 107 of record court says:

"The plaintiff by supplemental petition and *answer* to defendant alleges that the release made by him was for certain of the injuries so suffered, but did not include the injury occasioned to his mind nor the injury occasioned to his left eye by reason, &c. That these latter injuries were not in *contemplation* of the parties at the time the contract of release was entered into, and the defendant's liability therefor, is not released by said contract."

This language, in stating the issue of injuries, is substantially a copy of said plea No. 3 (Rec., p. 11).

So that if this court should hold that it would have been error to have construed the release as not intending by its face and terms to settle for the fracture of skull and serious injuries therefrom shown to have resulted, yet we think that a careful reading of the record will convince your Honors that the court was not *controlled alone* by the bare face of the instrument, but that his ruling in the admission of evidence, his remarks when the release was offered in evidence, "that release has not been set aside," &c., his said statement of the issues of injuries in his charge—from all these it is apparent that his Honor had in mind also the fact that neither party knew plaintiff had received the skull and brain injury when release was signed, as was alleged in our plea No. 3.

We call your attention to case of Shook *vs.* Ry. Co., 115 Fed. R., pp. 57–64. The issues of fact therein attempted to be raised were tendered by substantially the same character of pleading as herein shown.

On question of pleading, especially, the case is most applicable here.

Ry. Co. v Harris, 158 N.C.R. 326-332

The case of Queebe *vs.* Ry. Co., cited in opposing brief, we think, does not materially conflict with case at bar.

It refers to McCarty *vs.* Ry. Co., 94 Tex., p. 298, as a sustaining decision. It is remarkable that McCarty case, both in trial court and in Circuit Court of Appeals, was urged by plaintiff in error as against our contention that the face of the release, relative to the particulars specified, might be considered in *deducing the intention* of the parties as to what they contemplated while releasing.

If the Queebe case means to hold that particular specifications of injury cannot be regarded as qualifying a general clause of release and cannot be considered in arriving at the intention of the parties concerning the character of the injuries settled for, then the decision conflicts with the McCarty case, with many of the best works on contracts, with the common-law decisions, and is, in our humble judgment, unworthy of being applied against us here.

But we think, upon one point at least, that if there was no other case cited here by either party, the Queebe case would not demand a reversal of this judgment.

Its language, as shown near the bottom of page 18 of opposing brief, is what we have in mind, to wit:

"We repeat that what we have thus far considered is the application of the rule of construction by which the legal meaning of the release is to be ascertained, and not the principles governing in cases where such instruments are sought to be set aside or *restricted* in their operation on grounds of fraud or *mistake*." (Italics are ours.)

Opposing brief lays some stress upon a letter of Dashiel to Ward (Rec., p. 77) as indicating that, before executing release, he knew his skull was fractured, and that therefrom his brain and eye were in danger of derangement and loss. The whole of the letter is not quoted. Plaintiff therein states that his *back* and *shoulder*, not his *head* and *skull*, had troubled him.

We repeat, the undisputed testimony shows that neither party knew plaintiff's skull, brain, and eye were injured when he stated *the certain* personal injuries to the best of *his knowledge* and of the *character* described.

We respectfully submit that justice has been done by the verdict and the judgments below, and we ask for an affirmance hereof.

BEN. M. TERRELL,
Attorney for Defendant in Error, G. H. Dashiel.

Note: We invite attention to language of Civ. Court of Appeals in discussing dependants request for a peremption instruction (Rec p 109)

Respectfully
Ben M Terrell,
atty for Washies.

OPINION



Supreme Court of the United States.

No. 212.—October Term, 1904.

The Texas and Pacific Railway Company, Plaintiff in Error, *vs.* George H. Dashiell.	In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 29, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

This action was originally brought in the District Court of Tarrant County, in the State of Texas, and removed by the railway company to the United States Circuit Court for the Northern District of Texas on the ground that the railway company is a corporation under the law of the United States. The trial resulted in a verdict for the defendant in error for the sum of $7,500, upon which judgment was entered. It was affirmed by the Circuit Court of Appeals.

The action was for personal injuries sustained by defendant in error through the negligence of the railway company. The defendant in error was a conductor on one of the company's freight trains, with which another train collided, "whereby," it is alleged," plaintiff was seriously, painfully and permanently injured in many parts of his body and especially was he so injured in and about the head, eyes, back, sides, arms and shoulders, and in the organs and functions of his brain and in his entire mental and nervous system, and that as a result of said injuries plaintiff has, since the reception thereof, now is, and in the future will permanently be, helpless, injured and unsound of mind and body, and wholly incapable of transacting any kind of business or of doing any kind of mental or manual work, and that he now is and for the remainder of his life will be cared for and protected, if at all, by his friends and relatives."

And it is also alleged:

"That as a result of said negligence and collision plaintiff further says he was badly burned about the legs, sides, back, arms, hands and head, and that his left eye has become seriously affected by reason of said injury thereto, and by reason of said injury to his head and nervous system affecting said eye, in so much that the value, use and sight of said eye is now greatly impaired and almost entirely lost, and that the sight of his right eye is also now considerably weakened and impaired by reason of its sympathy for his said left eye. That as a result of said negligence and injury plaintiff now suffers, has suffered and for all his life will continue to suffer great physical pain and much mental anguish and pain."

Among other defences plaintiff in error pleaded a release executed by defendant in error on the 2d of February, 1901, which is as follows:

"Whereas on and prior to the 24th day of December, 1900, I, G. H. Dashiell, was employed by the Texas and Pacific Railway Co. as brakeman and extra freight conductor at or near Eastland, Texas, on the said 24th day of December, 1900, about 3.15 o'clock A. M. I sustained certain personal injuries in the manner and of the character described, to the best of my knowledge and ability, to wit:

"Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm, and giving me a scalp wound.

"And, whereas, it is by said railway company and myself mutually desirable to maintain amicable and pleasant relations and avoid all controversy in respect to said matter:

"Now, therefore, to that end, and in consideration of thirty and no/100 dollars, to me now here paid in cash by said Texas and Pacific Railway Company, I hereby release and acquit, and by these presents bind myself to indemnify and forever hold harmless said Texas and Pacific Railway Company from and against all claims, demands, damages and liabilities, of any and every kind or character whatsoever, for or on account of the injuries and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing, or hereafter arising or accruing, in any way therefrom.

"It is expressly understood that, although we remain as free to contract with each other as if this transaction had not occurred, the Texas and Pacific Railway Company has not and does not agree to bind itself to employ me at or for any time, or in any capacity whatsoever.

"And it is also expressly understood, that all premises and agreements respecting or in any wise relating to the subject hereof, are fully expressed herein and no others are made or exist."

The plaintiff in error further pleaded that defendant in error remained in its service and employment for about three months, and did at said time and at all times thereafter ratify and approve the release and all of its terms and provisions.

To that part of the answer which pleaded the release, defendant in error demurred, and also answered alleging that (1) at the time of its execution and ratification, if it was ratified, he was of unsound mind; (2) He and plaintiff in error were mistaken as to the extent of his injuries and did not contemplate the result set out in his petition; (3) The release was without consideration.

These defences to the release were disposed of by the court as follows:

"On the question of the release of the defendant from liability for the injury sustained by plaintiff you are charged that the agreement entered into between the plaintiff and the defendant company, which has been introduced in evidence, is a release of the defendant from liability for the particular injuries which are enumerated in the face thereof, to wit: injuries to his body, right leg, right arm and a scalp wound. The court does not, however, construe it to be a release for the injuries alleged to

have been received by him resulting in the impaired mental powers, and in the partial loss of sight in his left eye. These injuries are those for which damages are sought in this action, and the consideration of which will be submitted to you in this charge."

This interpretation of the release was affirmed by the Court of Appeals, and presents the only question in the case.

Plaintiff in error contends that the release was intended "to be a final settlement of all claims growing out of the accident." The defendant in error contends that it was a settlement only of the particular injuries enumerated.

An instantly occurring objection to the contention of plaintiff in error is that if the release was a settlement of all claims growing out of the accident, why enumerate the particular injuries. The mere collision of the trains was of no consequence independent of the injuries which resulted, and it was for the injuries satisfaction was to be made, and satisfaction would be measured by the visible injuries, and because measured by them they would be enumerated. If the accident alone was settled for there was a more direct way of accomplishing it.

But let us analyze the release. It commences with the recital of the relation of defendant in error with plaintiff in error, and that he "sustained certain personal injuries in the manner and of the character described, to the best of his knowledge and ability." Then follows this: "Extra east eng. 189 struck caboose of extra east eng. 255, 2½ miles east of Eastland, bruising my body, right leg, right arm, and giving me a scalp wound." For the injuries compensation was fixed at $30, with the additional consideration, let us say, in order to fully exhibit the contention of plaintiff in error, of the desire mutually entertained by him and defendant in error, (we quote from the release,) "to maintain amicable and pleasant relations and avoid all controversy in respect to said matter." Upon the word "matter" plaintiff in error puts its main reliance; indeed, makes it dominant of the meaning of the release. The contention is that it refers to the accident, not to the injuries, the latter serving only to identify the accident which "was the cause of action." This is an attempt to separate the inseparable. The negligence of plaintiff in error caused the accident which resulted in injuries to defendant in error and constituted his right or cause of action, and was the matter to which the release was addressed, but the extent of the release, whether confined to the injuries enumerated or includes other injuries, depends upon the other words of the release. They are as follows:

"I hereby release and acquit and by these presents bind myself to indemnify and forever hold harmless said Texas and Pacific Railway Company from and against all claims, demands, damages and liabilities of any and every kind or character whatsoever, for or on account of *the*

injuries and damages sustained by me in the manner or upon the occasion aforesaid, and arising or accruing or hereafter arising or accruing in any way therefrom."

We may admit that there is some ambiguity in these words. The release is "of all claims of every kind and character whatsoever," arising, not from all injuries and damages sustained, but from "*the* injuries and damages sustained." That is the specific or enumerated injuries sustained "in the manner or upon the occasion aforesaid," and the results of those injuries. The words "in the manner and upon the occasion" are a mere tautological identification of the collision and cause of the injuries. They add nothing else whatever to the meaning of the release. This construction gives purpose to the enumeration of the injuries and to all of the provisions of the release. And the rule of construction should not be overlooked that general words in a release are to be limited and restrained to the particular words in the recital. The rule is illustrated by the case of *Union Pacific Railway Company* v. *Artist*, (60 Fed. Rep. 365.) Artist was an engineer in the employ of the company and sustained injuries while switching cars. The release passed upon recited that it was "For amounts agreed upon in settlement of claim of Andrew S. Artist against the Union Pacific Railway Company on account of injuries received." The injuries were specified, and the release recited "settlement is in full of all claims and demands of every character," and concluded with a release "of all manner of actions, cause of action, suits, debts and sums of money, dues, claims and demands, whatsoever in law or equity." Passing on the effect of the release, Circuit Judge Sanborn, speaking for the Court of Appeals of the Eighth Circuit, applied the rule, citing *Jackson* v. *Stackhouse*, (1 Cow. 122, 126, and 2 Pars. Cont. 633 note.)

In *Lumly* v. *Wabash Railway Company*, (76 Fed. Rep. 66,) the rule was also applied by the Circuit Court of Appeals of the Sixth Circuit. The instrument enumerated the injuries received, released the railroad company "from all actions, suits, claims, reckonings, and demands for, on account of, or arising from injuries so as aforesaid received, and any, every and all results hereafter following therefrom."

Quebe v. *Gulf C. & S. F. R. R. Co.*, (97 Texas,) is cited in opposition. The case can be distinguished. Notwithstanding some of its expressions, we do not think it was the intention of the court to impugn the rule which qualifies general words by the particular words in a recital. The trial court submitted to the jury as a question of fact whether the release was intended to be confined to the injury mentioned in the release. Quebe contended that the release was so confined as a matter of law. The Supreme Court, replying to it, said that the intention was "to release the cause of action rather than to acknowledge receipt of payment for a part of the damage." The court admitted the existence of the rule of construction

relied on, and that it was supported by many authorities, but used language which seemed to confine it to cases where the release is attacked on the ground of mistake or fraud, and not to apply it when the interpretation or construction of language of a release is under consideration. This is certainly a doubtful limitation of the rule. The purpose is not to set aside or reform an instrument, but to ascertain its scope and meaning. In the case at bar, however, mistake is charged, and there is evidence tending to show that defendant in error's skull was fractured, and it was from that the impairment of his sight and mental powers resulted. Such effects, the testimony tended to show, could not result from a simple wound to the scalp. There was testimony going to show, therefore, that the injuries to defendant in error's skull, brain and eye were not known to the parties when the release was executed, and that his impaired mental powers and loss of sight were the results of those injuries, and not the result of those which were enumerated.

In *Union Pacific Railway Co.* v. *Harris*, (158 U. S. 326,) a written release was set up in bar of an action for damages against the railway company. Several defences were made to the release, among others, "that the minds of the parties never met on the principal subject embraced in the release, namely, the damages for which the action was brought." This defence was complicated in the instructions of the court with the defences of fraud and mental incompetency to understand the terms and extent of the release, and it is difficult to make satisfactory extracts from the charge of the trial court. Enough, however, appears to show that the court submitted to the jury the fact of mistake of injuries received as bearing on the effect of the release, and this action was affirmed by this court.

It follows from these views that judgment should be and it is

Affirmed.

Mr. Justice BREWER, Mr. Justice BROWN and Mr. Justice PECKHAM dissent.

True copy.

Test:

Clerk Supreme Court, U. S.